No. 3989

United States

Circuit Court of Appeals

For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von HOLT, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

Transcript of Record.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Let process issue as prayed for.

(Sgd.) J. T. DE BOLT,
Judge, Circuit Court, 1st Circuit.

Dated Aug. 7, 1919.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERICK GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Petition.

To the Presiding Judge of the Circuit Court of the First Circuit, Sitting at Chambers in Equity:

Your petitioners, H. Focke and H. M. von Holt, both of the City and County of Honolulu, Territory of Hawaii, trustees under the will and of the estate of James Gay, late of Mokuleia, Waialua, in the said City and County of Honolulu, deceased, respectfully represent to your Honor as follows:

1.

That the said James Gay duly made and published his last will and testament in writing on the 25th day of May, 1893; that a copy of the said will is hereto attached, and your petitioners hereinafter called the "complainants," beg leave to refer to the original thereof on the hearing of this their petition; [1*]

2.

That the said James Gay thereafter, to wit, on the 28th day of May, 1893, died without altering or revoking his said will; that the said will was on the 11th day of July, 1893, duly proved in the proper court of said Territory; that on the last-named date letters testamentary under the said will were duly issued to the complainant, H. Focke, and one Mary Ellen Gay, late of said Mokuleia, deceased, widow of said James Gay, and the said H. Focke and Mary Ellen Gay thereupon took upon

*Page-number appearing at foot of page of original certified Transcript of Record.

themselves the execution of the said will and by virtue thereof possessed themselves of all of the personal estate of the said testator, which was more than sufficient to answer and satisfy all his just debts and funeral and testamentary expenses; that the said Mary Ellen Gay died on, to wit, the 5th day of April, 1895, and that on the 20th day of December, 1895, the accounts of the said H. Focke, the surviving executor of the estate, were approved and the administration of the estate closed;

3.

That in and by the said will the said H. Focke and the said Mary Ellen Gay were nominated and appointed the trustees thereunder; and after the death of the said Mary Ellen Gay and on, to wit, May 20, 1895, one Cecil Brown, late of said Honolulu, deceased, was duly appointed a cotrustee of the said estate with the said H. Focke in the place and stead of the said Mary Ellen Gay, and thereafter and up to the 29th day of June, 1915—when the resignation of the said Cecil Brown as such trustee was accepted—the said H. Focke and Cecil Brown were the duly appointed, qualified and acting trustees under the said will; that on June 29, 1915, the complainant H. M. von Holt was duly appointed a cotrustee of the said estate. [2]

4.

That at the time of his death the testator was possessed of, interested in and entitled unto considerable personal estate, and of no freehold estate whatsoever, and that at the inception of the trust created in and by his said will the said personal

estate was of a value as shown by the inventory of the executors of Twenty Thousand Dollars ($20,000.00) or thereabouts and consisted of:

(a) A leasehold from one J. P. Mendonca dated the 27th day of May, 1884, for the term of fifty (50) years of a certain tract of land situated at said Mokuleia, held, owned and controlled by the said J. P. Mendonca—the said leasehold being hereinafter referred to and called the "Mokuleia" lease or leasehold—of the term of which leasehold there was at the time of the testator's death an unexpired residue of forty-one (41) years or thereabouts.

(b) A herd of cattle, horses and other livestock and certain farm, dairy and household effects running, situate and being on said "Mokuleia" leasehold; **and**

(c) A certain leasehold (hereinafter referred to and called the "Ookala" lease or leasehold) held by the testator from the Commissioners of Crown Lands of the Government of Hawaii under date of March 1, 1876, the said lease comprising the Ahupuaa of Humuula and being for the term of twenty-five (25) years from that date and a subsequent extension thereof for an additional term of seven (7) years, and as to which lease the said James Gay had disposed of all his rights thereunder except as regards that portion of the said Ahupuaa which was subleased [3] by him to the Ookala Sugar Plantation Company, Limited, under date of June 17, 1881—the rental reserved in said sublease being a percentage of the sugar, or the

process thereof, grown by said Ookala Sugar Plantation Company, Limited, on said land so subleased; that the residue of the term of said sublease was at the death of the testator some seven (7) years, and the term thereof was thereafter extended by the trustees to the 1st day of February, 1908.

5.

That in and by the said will all of the estate of the testator was bequeathed unto the trustees therein named upon trust to pay the rents, income, issues and profits arising therefrom to the said Mary Ellen Gay for the term of her natural life, and the said trustees were directed in and by the said will from and after the death of the said Mary Ellen Gay to pay one-half (½) of the said rents, income, issues and profits for the support, maintenance and education of Llewellyn Napela Gay, Reginald Eric Gay, and Arthur Francis Gay, sons of the testator, share and share alike, and one-half (½) of the said rents, income, issues and profits for the support, maintenance and education of Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, daughters of the testator, share and share alike, and said trustees were directed in and by the said will from and after the death of all of his said children to convey one-half (½) of the trust estate and all additions or increase thereto unto the children of the testator's sons above named, share and share alike—the child or children of any deceased child taking the parent's share—and to convey the remaining portion of the trust estate and all additions or increase

thereof unto the children of the testator's daughters above named, share and share alike—the [4] child or children of any deceased child taking the parent's share.

6.

That in and by the said will the testator expressed his wish and directed that the said trustees, or their successors, should manage, conduct and carry on the business of ranching and stock-raising at said Mokuleia, so long as the same could be done profitably and without loss; and that in and by the said will the said trustees, or their successors, were empowered to sell and convey the testator's property at Mokuleia at any time when in their discretion they should think that a sale of all said property at said Mokuleia would, by reinvestment of the money realized upon such sale, be beneficial and inure to the benefit of or increase the trust estate created under the said will.

7.

That up to the time of his death and for many years prior thereto the testator was and had been residing on the said Mokuleia leasehold and was and for many years had been conducting and carrying on the business of a rancher and stock-raiser on the larger portion thereof and was and had been using in connection with his said ranch and cattle business and as a part thereof the said herd of cattle, horses and other livestock and the farm, dairy and household effects above referred to, and was at the time of his death subletting and for many years prior thereto had sublet to divers ten-

ants small portions of the said Mokuleia leasehold for the purpose of growing rice and other agricultural products thereon; and that at the time of his death and for many years prior thereto the income of the testator was derived solely from his said ranch and cattle business at Mokuleia, the rentals [5] paid to him by the several sublessees of the said Mokuleia leasehold, and the rentals paid to him by the said Ookala Sugar Plantation Company, Limited, under the sublease hereinabove referred to and described.

8.

That the complainants, trustees as aforesaid, and their successors in trust, pursuant to the directions in the said will contained, carried on the testator's business of ranching and stock-raising at said Mokuleia until on or about the 9th day of December, 1898, when, with the consent of the then Judge of this court, a portion of the said Mokuleia leasehold containing an area of eight hundred (800) acres or thereabouts was leased by the then trustees to one B. F. Dillingham for the balance of the term of the said Mokuleia leasehold at a rental of five per cent (5%) of the sugar, or the proceeds thereof, grown thereon; that the said lease to the said B. F. Dillingham was thereafter assigned to the Waialua Agricultural Company, Limited, which company now holds the lands thereby demised together with an additional area of some sixty-five (65) acres leased to it directly by the trustees on the 2d day of July, 1902; that the trustees continued to carry on the said business of ranching and stock-

raising on the rest of the said Mokuleia leasehold until the 28th day of April, 1906, when with the consent of the then Judge of this court the rest of the land covered by the said Mokuleia lease was sublet and is now being sublet to third persons for the residue of the term of said Mokuleia lease; that on said last-mentioned date the livestock, farm, dairy and household effects were sold by the then trustees for the sum of Four Thousand Seven Hundred and Thirty-five Dollars ($4,735.00), of which said last-named sum the then trustees of the estate [6] were directed by the said Court to retain the sum of Four Thousand Sixty-five Dollars ($4,065.00) as principal or capital of the testator's estate.

9.

That the said Ookala lease expired on the 1st day of February, 1908; that the said Mokuleia lease will expire on the 30th day of April, 1934; and that the income of the estate consists wholly of the rentals reserved in the various subleases made by the complainants and their predecessors in trust, and the income from the principal sum of Four Thousand Sixty-five Dollars ($4,065.00) above named or the securities in which the same has from time to time been invested.

10.

That the children of the testator now living and who are named as respondents herein (and are hereinafter referred to as "the life tenants") are as follows: Llewellyn Napela Gay, residing in Honolulu aforesaid; Reginald Eric Gay, residing in

Honolulu aforesaid; Arthur Francis Gay, residing in the City of San Francisco, California; Alice Mary K. Richardson, wife of Thomas Everett Richardson, residing in the City of Oakland, California; Helen Fanny Gay, residing at Corcoran, California, and Frida Gay, residing at San Jose, California, and that the other of the testator's children, namely, Ethel Gay, died, unmarried on or about the 18th day of July, 1902.

11.

That the grandchildren of the testator, being children of the testator's children named in the said will, who are now living and are named as respondents herein (and are hereinafter referred to as the "remaindermen"), are as follows: Eva Gay, a minor of the age of seventeen (17) years, and Beatrice Gay, a minor of the age of ten [7] years, daughters of Llewellyn Napela Gay and his wife Rea Jane Gay, residing in the City of San Francisco; Sonny James Mokuleia Gay, a minor; Michael Vanatta K. Gay, a minor, and Llewellyn Napela Gay, a minor, all residing in Honolulu aforesaid, children of Reginald Eric Gay; Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, all residing in the City of Oakland, California, children of Alice Mary K. Richardson.

12.

That at all times during their conduct and management of the testator's estate, the complainants, trustees as aforesaid, and their predecessors in trust, have paid all of the net rents, income, issues

and profits of the said estate, after paying the expenses of and incidental to the management of same, to the life tenants, and have made no provision thereout for the preservation of the capital or *corpus* of the said estate, by amortization or otherwise, save and except in so far as the sum of Four Thousand Sixty-five Dollars ($4,065.00) above referred to has been held and invested by them from time to time as capital of the said estate.

13.

That in their conduct and management of the said estate and in paying out all of the net rents, income, issues and profits of the same to the life tenants without making any provision for the preservation of the capital or *corpus* thereof the complainants, trustees as aforesaid, and their predecessors in trust were guided by the advice and instructions of the said Cecil Brown, deceased, who prepared the said will in accordance with the instructions of the testator, professed to know the testator's intentions in respect to the manner in which and the persons by whom his estate was to be enjoyed, and who [8] as above set forth acted as a trustee of the said estate for upwards of twenty years.

14.

That the complainants, trustees as aforesaid, have recently, to wit, within the last few months been advised by counsel that it is uncertain and doubtful from the language used in the will of the testator what the testator's intentions were as to the respective rights in his estate of the life ten-

ants and remaindermen and that it is a matter of uncertainty and doubt whether under the provisions of the said will and in view of the fact that the principal assets of the trust estate, namely, the said Mokuleia and Ookala leaseholds, were of a wasting and diminishing nature, the trustees of the said estate were authorized in the past or will be authorized (Copyist Error) (~~in the past will be authorized~~) in the future to pay out all the net rents, income issues and profits of the said estate to the life tenants without making provision out of said rents, income, issues and profits for the preservation of the *corpus* of the said estate for the benefit of the remaindermen, or whether there should not have been retained in the past and should not in the future be retained out of the said rents, income, issues and profits such sums as may be necessary for the purpose of restoring for the benefit of the remaindermen the capital or *corpus* of the said estate to the value thereof at the death of the testator.

15.

That the complainants, trustees as aforesaid, desire to carry out the wishes of the testator and to execute the trusts of the said will, and to the end that the doubts and uncertainties which have recently arisen may [9] be resolved they desire and are entitled to the instructions of the Court as to the relative rights of the life tenants and the remaindermen in the trust estate, and as to their duties in respect to the management of the said

estate under the said will, and the disposition of the rents, income, issues and profits thereof.

WHEREFORE THE COMPLAINANTS PRAY:

1. That the respondents may be summoned by publication or otherwise as the Court may direct to appear and answer all and singular the premises and set forth their respective claims and contentions as to the matters therein set forth, and be bound by the proceedings herein and by such order, direction and decree as to the Court may seem meet.

2. That a guardian *ad litem* may be appointed for said Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt and Ethel Frida Holt, minors, to represent their interests herein.

3. That complainants may be instructed by this Honorable Court as to their duties in the execution of the trusts created by the testator in and by his said will; that all proper accounts may be taken, and all necessary directions given for carrying the testator's intentions into execution.

4. For costs and for such other, further an general relief as the nature of the case shall require, and to the Court shall seem meet.

And the complainants will ever pray, etc.

Dated: Honolulu, T. H., August 6th, 1919.

(Sgd.) H. FOCKE,

(Sgd.) H. M. von HOLT,

Trustees Under the Will and of the Estate of James Gay, Deceased.

W. L. STANLEY,

Counsel for Complainants. [10]

City and County of Honolulu,
Territory of Hawaii,—ss.

H. Focke, being duly sworn, upon oath deposes and says: That he is one of the complainants above named, and a trustee of the Estate of James Gay, deceased; that he has read the foregoing petition and knows the contents thereof and that all and singular the matters and things therein alleged are true to the best of his knowledge and belief.

(Sgd.) H. FOCKE.

Subscribed and sworn to before me this 6th day of August, 1919.

[Seal]

(Sgd.) SYLVIA LESLIE BRYANT,

Notary Public, First Judicial Circuit, Territory of Hawaii. [11]

(COPY)

Exhibit "A."

Know all men by these presents that I James Gay of Mokuleia, Waialua in the Island of Oahu being of sound and disposing mind and memory do make publish and declare this my last will and

testament, hereby revoking and making null and void all former wills by me made.

I hereby nominate and appoint my wife Mary Ellen Gay and my friend Hermann Focke to be the Executrix and Executor and also the Trustees of this my will, hereby directing my said executrix and executor to pay all my just debts and funeral expenses as soon as they can conveniently do so.

I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said Trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said Trust estate as follows: one half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said [12] Trustee or his successor to convey one half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said Trust estate and all additions or increase thereof, I direct my said Trustee or his successor in asid Trust to convey the same unto the children of my said daughters, Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying.

In the event of the death, resignation or other incapacity of my said Trustees or either of them it is my wish that one of the Judges of the Circuit Court of the First Circuit of the Hawaiian Islands shall appoint a new Trustee or Trustees as the case may be in the place and stead of the one dying, resigning or becoming incapacitated, and the Trustee or Trustees so appointed shall have all the powers and authorities as if named herein.

It is my wish and I hereby direct that my said Trustees or their successors or successor, shall man-

age, conduct and carry on the business of ranching and stock-raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of [13] all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will.

And lastly I hereby direct that the executrix and executor and Trustees herein named shall serve as such without giving bonds.

In witness whereof I have hereunto set my hand and seal this 25th day of May A. D. 1893.

(Sig.) JAS. GAY. (Seal)

Signed, sealed, published and declared by the said James Gay as and for his last will and testament, in the presence of us, who in his presence, and in the presence of each other, and at his request, have hereunto set our names as witnesses this 25th day of May, 1893.

(Sig.) CECIL BROWN.
(Sig.) JOHN RICHARDSON.
(Sig.) THOS. WM. GAY. [14]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Appointing Guardian Ad Litem.

It appearing that the respondents Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt, and Ethel Frida Holt are minors, and that a guardian

ad litem is necessary to represent them and their interests in the above-entitled suit:

IT IS HEREBY ORDERED that Harry Edmondson, Esquire, member of the bar of this court, be and he hereby is appointed guardian *ad litem* of said minors to defend the said suit in their behalf, and that he serve as such without bond.

Done at Chambers in Honolulu this 7th day of August, 1919.

[Seal] (Sgd.) J. T. DE BOLT,
Second Judge of Said Court Presiding at Chambers in Equity. [15]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS — IN EQUITY.

E. No. ——.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor,

MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Answer of Respondents Llewellyn N. Gay et al. (The "Life Tenants").

To the Presiding Judge of the Circuit Court of the First Judicial Circuit, Sitting at Chambers in Equity:

Now come the above-named respondents Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, and Frida Gay, the now living children of James Gay, deceased (hereinafter also referred to as the "life tenants"), and for answer to the petition of the complainants in the above-entitled cause, as amended by the addition thereto of the record in the matter of the estate and trust under the will of said decedent of record in this court in Probate Case No. 2849, now say: [16]

1.

These respondents admit the several matters alleged and set forth in all of the paragraphs numbered from and including paragraph 1 to and including paragraph 13 of said petition.

2.

Further answering said petition, and with particular reference to paragraphs 14 and 15, and to the prayer for instructions therein set forth, and

not only in conjunction with but independently of the allegations of said petition, these respondents say:

That the "Mokuleia" and "Ookala" leaseholds, so called in said petition, were taken and held by the testator in his lifetime, and were by his will transmitted to the trustees thereunder as part of his estate.

That the testator in fact contemplated that said lease, acquired and used by him in his lifetime, would be held as part of his estate under the trust created by his will; and that the testator must be presumed to have known that, by holding, the said leases would "wear away" and ultimately expire.

That it was the intent of the testator, apparent not only from the direct provisions of his will, but from all of the surrounding facts and circumstances, that all of the rents, income, issues and profits, arising from his trust estate under said will, should be paid to the life beneficiaries therein named, without diminution of any kind; and that the testator did not contemplate or intend, nor will the terms of said will permit, that any depreciation or change in the inherent value of said leaseholds (or either of them) by reason of their approaching expiration, should be charged to or borne by the life beneficiaries, or that their value, as "principal," should be preserved intact for the benefit of [17] the remaindermen by any deductions from the rents, income, issues or profits arising from the trust estate, or by any other form of amortization.

That the acts of the trustees, in disposing of the

livestock and discontinuing the operation of the ranching business on the demised premises, and making subleases of portions of the demised lands, have resulted in greater income and profit being derived from the trust estate, without any prejudice to the remaindermen by reason thereof.

That the administration of the trust estate, as heretofore carried on in the manner described in paragraphs 12 and 13 of said petition, has been proper and in accordance with law and the terms of said will and the intent of said testator, and should not be interrupted or altered.

WHEREFORE, these respondents, being the "life tenants" under said trust, pray that the method of administration of said trust estate by the trustees under said will, in all of the respects hereinbefore mentioned and referred to, may be approved by this Honorable Court, and that the complainants, as the present trustees under said will, and their successors in said trust, be instructed to continue, until the death of all of the testator's children (the life tenants aforesaid) to pay one-half of the said rents, income, issues and profits of the trust estate, including the realizations under said "Mokuleia" lease, for the support, maintenance and education of the sons of the testator, and the other one-half thereof for the support, maintenance and education of the daughters of the testator, without deduction or diminution of any kind to provide for keeping up or restoring any value of the *corpus* of the estate for the benefit of the grandchildren of the testator, by amortization or otherwise.

Dated: Honolulu, T. H. November 26th, 1919.
[18]

(Sgd.) REGINALD ERIC GAY.
LLEWELLYN NAPELA GAY.
ARTHUR FRANCIS GAY.
ALICE MARY K. RICHARDSON.
HELEN FANNY GAY.
FRIDA GAY.

By Their Attorneys,
(Sgd.) SMITH, WARREN & WHITNEY.

Territory of Hawaii,
City and County of Honolulu,—ss.

Reginald Eric Gay, being duly sworn, deposes and says that he is one of the respondents who are named as life tenants in the foregoing answer and that he makes this affidavit on behalf of himself and the others of said life tenant respondents; that he has read the said answer and knows the contents thereof and that the matters and things therein set forth are true to the best of his information and belief.

(Sgd.) REGINALD ERIC GAY.

Subscribed and sworn to before me this 26th day of November, 1919.

[Seal] (Sgd.) ALBERTA BUDD,
Notary Public, First Judicial Circuit, Territory of Hawaii.

We hereby acknowledge receipt of a copy, each of the foregoing answer; this 28th day of November, 1919.

(Sgd.) W. L. STANLEY,
Attorney for Complainants.
(Sgd.) H. EDMONDSON,
Guardian *Ad Litem* of Minor Respondents.

[Endorsed]: E. 2252. 3/1. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al. Respondents. Answer of Respondents. Filed at 10:20 o'clock A. M. Nov. 28, 1919. (S.) B. N. Kahalepuna, Clerk. Smith, Warren & Whitney, Attorneys at Law, Bank of Hawaii Building, Honolulu, T. H. [19]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS — IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN

FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Amended Answer of the Minor Respondents Above Named.

Now come the minor respondents above named by Harry Edmondson, their guardian *ad litem,* and for amended answer to the petition filed herein allege as follows:

1.

That the said respondents admit the allegations contained in paragraphs 1, 2 and 3 of the said petition.

2.

In answer to paragraph 4 of the said petition the said respondents admit that at the time of his death, James Gay, the testator named in said petition, was possessed of, interested in and entitled unto considerable personal estate, but said respondents have no knowledge or information sufficient to form a belief that [20] the said testator was not possessed of, interested in or entitled unto some freehold estate, and leave the allegations thereof to be proven by the complainants above named, as they may be able so to do.

3.

In further aswer to paragraph 4 of the said petition the said respondents allege that they may have no knowledge or information sufficient to form a belief that at the inception of the trust created in and by the will of the said testator, his personal estate was of a value of $20,000.00, and leave the allegations thereof to be proven by the said complainants. Said respondents admit each and every other allegation contained in paragraph 4 of the said petition.

4.

Said respondents admit the allegations contained in paragraphs 5 and 6 of the said petition.

5.

In answer to the allegations contained in paragraph 7 of the said petition, said respondents allege that they have no knowledge or information sufficient to form a belief of any or all of the allegations therein contained, but leave the same to be proven by the said complainants.

6.

Said respondents admit the allegations contained in paragraphs 8, 9, 10, 11 and 12 of the said petition.

7.

In answer to paragraph 13 of the said petition, the said respondents allege that if the said complainants and their predecessors in trust were guided by the advice and instructions of one Cecil Brown named in the said petition in paying out all of the net rents, income, issues and profits of

the estate mentioned in said [21] petition, to the life tenants mentioned in said petition without making any provision for the preservation of the capital or *corpus* of the said estate, they are not relieved from the duty, responsibility and liability of executing the trusts in said will contained, according to the terms thereof, and according to law.

8.

In further answer to paragraph 13 of the said petition, said respondents allege that they have no knowledge or information sufficient to form a belief that the said Cecil Brown prepared the said will of the said testator either in accordance with the instructions of the said testator, or at all, or that the said Cecil Brown professed to know or did know the testator's intentions in respect to the manner in which, and the persons by whom his estate was to be enjoyed, and leave complainants to the proof thereof. Said respondents allege that all the allegations contained in paragraph 13 of the said petition are irrelevant and immaterial.

9.

In reply to paragraph 14 of the said petition, said respondents are informed and believe and allege the fact to be that there is no uncertainty or doubt under the provisions of the said will that the principal assets of the trust estate, namely the said Mokuleia leaseholds are of a wasting and diminishing nature, and allege that the complainants, the trustees of the same, were not after they ceased to conduct the testator's business of a rancher and stock-raiser, authorized by the said will to

pay out all of the said rents, income, issues and profits of the said estate to the life tenants, the respondents above named, other than the said minor respondents, without [22] making provision out of the said rents, income issues and profits for the preservation of the *corpus* of the said estate for the benefit of the said minor respondents. Said minor respondents allege that the said leaseholds and subleases thereof should have been sold, or there should have been retained in the past and should be retained in the future out of the said rents, income, issues and profits, such sums benefit of the said minor respondents the capital or *corpus* of the said estate to the value thereof.

10.

Said respondents are informed and believe, and allege the fact to be that the said leaseholds and subleases thereof were of great value at the date the same should have been sold, and are greatly in excess of that value now.

WHEREFORE THE SAID MINOR RESPONDENTS PRAY,

1. If it is impossible to ascertain the value of the leaseholds mentioned in the petition herein,

(a) That the trustees be instructed to take the value of the leaseholds at the date of the testator's death, and allow the life tenants 6% interest per annum thereon and accumulate the surplus for the benefit of the remainderman; or

(b) To wait until the expiration of the lease, then ascertain the sum which, if invested at 6% interest per annum with annual rests would equal

the total rents received on the subleases after deducting therefrom the total rent paid on the head lease, and treat that sum as *corpus,* and the balance as income; [23]

2. Or that the trustees be instructed to sell the leaseholds and treat the proceeds as *corpus* and invest the same at 6% interest for the benefit of the life tenants;

3. For such other and further relief as to this Court may seem meet; and

4. That this answer may be taken as a Joinder to the above named.

Dated, at Honolulu, T. H. January 23d, 1920.

(Sgd.) H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Said Minor Respondents.

Service of a copy hereof admitted this 6th April, 1920.

(Sgd.) HARRIET L. NOBLE.
W. L. STANLEY,
Attorney for Complainants.

Service of a copy hereof admitted this 6th April, 1920.

(Sgd.) SMITH & WARREN,
Attorneys for Respondents Life Tenants.

[Endorsed]: E. 2252. 3/1. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Amended Answer of Minor Respon-

dents. Filed at 1:35 o'clock P. M. April 6, 1920. (S.) B. N. Kahalepuna, Clerk. H. Edmondson, Attorney-at-Law. Honolulu, T. H. Attorney for Minor Respondents. [24]

In the Circuit Court of the First Judicial Circuit Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decision.

The complainants, H. Focke and H. M. von Holt, trustees under the will and of the estate of James Gay, deceased, on the 13th day of September, 1919,

filed a petition in this court praying that the Court instruct them concerning their duties in the execution of the trust created by the testator in and by his said will. On the 25th day of May, A. D. 1893, James Gay executed his last will and testament. Thereafter, on, to wit, the 28th day of May, 1893, the said James Gay died without altering or revoking the said will. On the 11th day of July, 1893, the said will was duly admitted to probate in the proper court in and for the Territory of Hawaii. On the last-named date, letters testamentary under the said will were duly issued to H. Focke and to Mary [25] Ellen Gay, the widow of the said James Gay. Thereafter on, to wit, the 5th day of April, 1895, the said Mary Ellen Gay died, and on, to wit, May 20, 1895, one Cecil Brown was duly appointed in her stead as cotrustee of the said estate with the said H. Focke. On the 29th day of June 1915, the said Cecil Brown resigned, as such trustee and his resignation was duly accepted. On the said 29th day of June, 1915, the complainant, H. M. von Holt, was duly appointed a cotrustee of the said estate, with the said H. Focke in the place and stead of the said Cecil Brown. The said H. M. von Holt and the said H. Focke were at the time of the filing of the petition herein and are now the duly appointed, qualified and acting trustees of the said estate. At the time of the death of the said James Gay he was possessed of certain property consisting of a leasehold from one J. P. Mendonca, dated the 27th day of May, 1884, for the term of fifty (50)

years a certain cattle, horses and other livestock and certain farm, dairy and household effects situate and being on said Mokuleia leasehold, and a certain leasehold from the Commissioners of Crown Lands of the Government of Hawaii, dated March 1, 1876, and being for the term of twenty-five (25) years from that date and a subsequent extension thereof for an additional term of seven (7) years. The lands described in the last named lease, comprised the Ahupuaa of Humuula, and were situate on the Island of Hawaii. At the time of filing the petition herein, this lease had expired and the estate of James Gay no longer had any interest therein and it need not be further considered. On the 28th day of April, 1906, the trustees of said estate, acting under the authority given them by said testator sold and disposed of the livestock, farm, dairy and household effects and the proceeds thereof were invested in accordance with the wishes of the said testator as expressed in his said will. [26]

The only part of the property owned by the said James Gay at the time of his death which is now in the possession of and under the control of the trustees of his estate, is the leasehold of the Mokuleia ranch which the said James Gay acquired from J. P. Mendonca. The said James Gay by his last will and testament devised and bequeathed unto Mary Ellen Gay and Hermann Focke all of his estate, real personal or mixed, upon the following terms and conditions: "I hereby give, devise and bequeath unto Mary Ellen

Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said Trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said Trust estate as follows: one-half thereof for the support and maintenance of my sons Llewelly Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline E. Gay, Helen Fanny Gay, and Friday Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen, I direct my said Trustee or his successor to convey one half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased [27] child to take the parents share. And as to the remaining portion of said Trust estate and all additions or

increase thereof, I direct my said Trustee or his successor in said Trust to convey the same unto the children of my said daughters, Alice Mary Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Friday Gay, share and share alike, and the child or children of any deceased child to take the parent's share.

"And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child so dying.

"In the event of the death, resignation or other incapacity of my said Trustees or either of them it is my wish that one of the Judges of the Circuit Court of the First Circuit of Hawaiian Islands shall appoint a new Trustee or Trustees as the case may be in the place and stead of the one dying resigning or becoming incapacitated, and the Trustee or Trustees so appointed shall have all the powers and authorities as if named herein.

"It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Moluleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale

of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will." [28]

It will thus be seen that at the time James Gay made his will, he had in mind two classes of persons for whom he wished to make provision. The first class was composed of his wife and children, all of whom were living at the time of his death and who were the objects of his immediate concern. The second class was composed of his grandchildren who had not yet come into being, and whose interest in his estate was made entirely conditional. Of the first class there are now living Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Gay, Helen Fanny Gay, and Frida Gay, all of whom are the children of the said James Gay. Of the second class there are now living, Eva Gay, Beatrice Gay, Sonney James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt, and Ethel Frida Holt, all of whom are the grandchildren of the said James Gay. The will directs the trustees to pay, after the death of Mary Ellen Gay, the rents, income, issues and profits arising out of the estate, to the enumerated children of the testator, in designated proportions. Thus was created in them a life tenancy and they thereby became entitled to the bequests made for their benefit. Anticipating that these life tenants might have issue and desiring

to dispose of the *corpus* of his estate upon their death, the testator directed the trustees, after the happening of that event, to convey his estate to the children of his children in the proportions mentioned in the will. The grandchildren, therefore, of the testator, all of whom came into being subsequent to his death, are the remaindermen, and as such have a potential interest in the estate. The conflict precipitated by the filing of the petition, is between the life tenants and the remaindermen in which the trustees occupy a position of neutrality. In order to determine the controversy and correctly advise [29] the trustees, it is necessary to bear in mind that the only part of the James Gay estate now in the possession and under the control of the trustees, is the unexpired term of the leasehold on the Mokuleia property. This lease was procured by James Gay from one Mendonca, on May 27th, 1884, and its duration was fixed at fifty years. It will, therefore, expire on May 26, 1934. At the time it was executed and for sometime thereafter, the property conveyed was used as a stock ranch and was of comparatively small value. Latterly, however, the development of the sugar industry in Hawaii, and the adaptation of the land to such uses, has greatly increased its value, and at the present time, the income derived from it amounts to $25,887.00 annually. Heretofore the trustees have paid this income to the life tenants. Their right to do so under the will has, however, been questioned and they have very properly sought judicial advice.

It is contended by the remaindermen that in as much as they were given an estate in remainder by the testator in the property devised to the trustees, and in as much as the only remaining portion of the estate is the Mokuleia leasehold, and in as much as the value of this leasehold is constantly diminishing by the lapse of time and will probably expire and therefore be valueless before their interest attaches, it is the duty of the trustees to convert the leasehold into cash and invest the proceeds in some form of security that will remain intact for their ultimate benefit. The soundness of this contention must be determined by the terms of the will and the canons of testamentary construction.

It must be borne in mind that the property devised to the trustees and from the income of which they were directed to make provision for the life tenants, consisted entirely of the leaseholds heretofore mentioned. The value of these leaseholds was [30] not stable and enduring, but by their very nature became less valuable each year as the period of their expiration approached. It was established by the evidence, that at the time the will was made, and at the time of the death of the testator, the life tenants now living, were minors and without issue. So that when the testator directed his trustees to pay the rents, income and profits derivable from these leaseholds to his children and then directed them upon the death of all his children, to convey his estate to his grandchildren in the proportions designated by his will,

he must have had in mind the possibility that unless the character of the estate was changed, the sources from which his children were to be maintained would be exhausted during their lives, and there would be nothing left for his grandchildren.

If the testator had, therefore, intended to impose upon his trustees the absolute duty of preserving an estate for the benefit of his grandchildren, he would have directed them to convert the leaseholds of which he was possessed, into a more permanent form of investment. Instead of doing this, however, we find the following provision in his will. "It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Truste Estate created under this will, to sell and convey the said property at Mokuleia [31] free and barred of the Trust created by this will."

It was contended at the hearing, by the guardian *ad litem* for the remaindermen, that a direction by the testator to the trustees, nominated by him to pay to the life tenants the income, issues, rents and profits derivable from his estate, was not a devise

of the leaseholds themselves, to the life tenants, and that under the law it became the duty of the trustees to protect the interests of the remaindermen by disposing of the leaseholds while they were valuable and reinvesting the proceeds in more permanent securities. It was urged that while in the case of a devise of specific property for the life of the devises, with remainder over to another, there is no duty imposed by law upon the life tenant to dispose of the property and reinvest the proceeds for the benefit of the remaindermen, even though it be of a depreciating nature, and its use by the life tenant might consume it entirely to the utter exclusion of the remaindermen, yet a different rule applies where the property is not identified, but described in general terms.

Many authorities were cited in support of this contention, and there is much reason for the doctrine they announce. It was no doubt this canon of testamentary construction which very properly influenced the trustees in seeking the advice of the Court, before proceeding further to execute the trust imposed upon them by the will of James Gay.

There are two reasons why this principle cannot prevail in the case now before the court. In the first place it is conceded that the only estate of which the testator died seized and possessed, were the Ookala leasehold, the Mokuleia leasehold and certain livestock and household furniture. A devise, therefore of all his estate was equivalent to a devise of each item *eo nomine.* If the will had identified each portion of the property devised,

there would be no basis for the contention of the [32] remaindermen. What difference can it make that the testator instead of doing this devised his estate as a whole when it is conceded that it consisted solely of the two leaseholds and certain personal property.

In the second place, it is clear from that part of the will last above quoted, that so far as the Mokuleia leasehold is concerned, it was the intention of the testator to leave it discretionary with the trustees, to sell it or continue to hold it for the benefit of the life tenants. This discretion is unlimited and it would be highly improper for the Court to substitute its judgment for that of the trustees, and thereby interfere with the will of the testator. In the event their judgment should dictate a sale of this leasehold, I am of the opinion, they would be obliged to devote the proceeds to some form of investment that would certainly enure to the benefit of the remaindermen. If, on the other hand, they continue to hold it, they should, in order to comply with the testator's wishes, pay the income, rents and profits to the life tenants.

[Seal] (Sgd.) JAS. J. BANKS,
Third Judge.

[Endorsements]: E. 2252. 3/1. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers—in Equity. H. Focke and H. M. von Holt Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al., Respondents. De-

cision. 35/161. Filed at 11:15 o'clock A. M., April 2, 1920. B. N. Kahalepuna, Clerk. [33]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decree.

The complainants in the above-entitled cause, acting as trustees under the will and of the estate of James Gay deceased, having filed their petition on the 7th day of August, 1919, asking that they be

instructed by this Court as to their duties in the execution of the trusts under the will of said decedent and given all necessary instructions for carrying the testator's intentions into execution, after a determination by the Court of the issues presented by the pleadings herein;

AND upon the filing of said petition, the Court having duly appointed Harry Edmondson, Esq., as guardian *ad litem* of the above-named respondents, Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, [34] Llewellyn Napela Gay, Albert Gay Harris, Walter. William Holt, Alice K. Holt and Ethel Frida Holt who are minors; the remaining respondents (being life tenants under said will), being represented by L. J. Warren, Esq., of the firm of Smith, Warren & Whitney; and the complainants, as trustees as aforesaid, being represented by Wm. L. Stanley, Esq., as counsel;

AND the said cause having regularly come on for hearing before the undersigned judge of this Court, and with all of the parties represented as aforesaid and the said guardian *ad litem* acting as his own counsel; and the Court having now heard and fully considered all of the evidence adduced by the respective parties upon the issues involved herein; and having heard and considered the arguments of counsel thereon; and the Court having on the 2d day of April, 1920, rendered and filed its decision upon the issues aforesaid, holding that the intention of the testator expressed in said will was to give to the trustees under said will full

authority either to hold or to dispose of the said Mokuleia leasehold and interests incidental thereto, in their discretion, and that the exercise of such discretion ~~would~~ [J. J. B.] should not be interfered with by this Court;

NOW, THEREFORE, IT IS HEREY ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the said complainants, as trustees under said will, be and they are hereby informed and instructed that by the terms and legal effect of said will they have been given and granted and now have the right and authority, in their discretion, to determine whether or not any sale or disposition of the said Mokuleia leasehold and property shall at any time or extent be made;

(2) That so long as the trustees shall continue to hold the property they are required by the terms and [35] legal effect of said will to pay the whole of the net rents, income, issues and profits arising therefrom (including the interest from the investment of the proceeds of sale of the property sold and the rents derived from the subleases of the land leased to the deceased by J. P. Mendonca), as follows: one-half thereof to the testator's sons, Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay, share and share alike, for their support and maintenance, the child or children of any of them who shall die to take the share of the deceased parent by right of representation, and the other one-half thereof to the testator's now living daughters, Alice Mary K.

Richardson, Helen Fanny Gay and Frida Gay, share and share alike (the other daughter, Ethel Pauline N. Gay, having died without issue), for their support, maintenance and any necessary education, the child or children of any of them who shall die to take the deceased parent's share by right of representation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the costs incurred in this proceeding be paid by said Trustees out of the income of the trust estate.

Done in open court this 6 day of April, 1920.

[Seal] (Sgd.) JAS. J. BANKS,
Third Judge, First Circuit, Sitting at Chambers in Equity.

Attest: (Sgd.) B. N. KAHALEPUNA,
Clerk.

[Endorsed]: E. 2252. 3/1. Circuit Court, First Circuit, Territory of Hawaii, at Chambers, in Equity. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al., Respondents, Decree. 35/161. Filed at 2:15 o'clock P. M. April 6, 1920. (Sgd.) B. N. Kahalepuna, Clerk. [36]

In the Supreme Court of the Territory of Hawaii.
October Term, 1920.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, LLEWELLYN NAPELA, GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor.

No. 1273.

Appeal from Circuit Judge First Circuit.
Hon J. J. BANKS, Judge.

Argued March 22, 23, 24, 1921.

Decided April 5, 1921.

COKE, C. J., KEMP and EDINGS, JJ.

Wills—Life Tenants and Remaindermen—Rule in Howe vs. Earl of Dartmouth.

Where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by different persons in succession it is presumed to be the intention of the testator that such of his personalty as is of a wasting

or perishable nature is to be converted in such way as to produce capital of a permanent nature bearing interest unless upon the construction of the will it appears that the testator had a different intention. [37]

Same—Same—Provisions Which Negative the Presumption of Intention to Convert.

Directions by a testator to his trustees to carry on a ranching business, so long as it can be done so profitably, on a leasehold devised to them in trust to be enjoyed by different persons in succession, and investing them with a discretionary power to sell the leasehold when in their discretion they think that a sale would by reinvestment of the money realized from such sale be beneficial and inure to the benefit of or increase the trust estate, are inconsistent with an intention that the leasehold should be converted. [38]

Opinion of the Court by Kemp, J.

This proceeding was commenced in behalf of the complainants as trustees under the will and of the estate of James Gay, deceased, by a bill in equity praying for instructions as to their duties as trustees under said will. All parties now in being who are interested in the trust estate were made respondents. For convenience the minor respondents above named will be referred to as remaindermen and the other respondents as life tenants. The remaindermen are represented by a guardian *ad litem,* their interests being separate from and

opposed to the interests of the life tenants. The point at issue is whether certain wasting assets (leaseholds) should have been, or what remains of them should be, preserved by amortization or otherwise for the benefit of the remaindermen. The remaindermen contend that the value of the leaseholds and all additions and increase thereto constitute the *corpus* of the estate and should be preserved for their benefit, while the life tenants contend that it was the intention of the testator as shown by the terms of his will that his trustees should retain the *corpus* of the estate in the form in which he left it, paying to them all the income derived therefrom, including rents from subleases even though by so doing the estate may entirely waste away and leave nothing to the remaindermen at the termination of the trust. A decree was entered by the Circuit Judge adverse to the claims of the remaindermen and in accordance with the claims of the life tenants, from which decree the remaindermen have appealed to this court.

The testator made his will dated May 25, 1893, a copy of which is attached to the complaint. After providing for the appointment of his wife, Mary Ellen Gay, and his friend, Hermann Focke, to be executor and executrix of his will and also trustee of his estate under the will and directing them to pay all his just debts and [39] funeral expenses, the will provides:

> "I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and where-

soever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said trustee Hermann Focke and his successor in said trust to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said trustee or his successor to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said trust

and all additions or increase thereof, I direct my said trustee or his successor in said trust to convey the same unto the children of my said daughters, Alice Mary Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

"And I direct my said trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen Gay to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying."

Then follows a power of appointing new trustees and the will continues:

"It is my wish and I hereby direct that my said trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the trust estate created under this will, to sell and convey said property at Mokuleia free and barred of the trust created by this will."

The testator died three days after making his will leaving surviving him his wife and the three sons

and four daughters named in the will, the youngest of which was three or four years of age and [40] the eldest about sixteen years of age. His wife died in 1895 and his daughter Ethel died in 1902 unmarried. The will was duly admitted to probate soon after the death of the testator. The complainants are the present trustees of the estate devised by the will. At his death the testator's estate, as shown by the inventory filed in the probate proceeding, consisted of the following property: (1) a lease dated March 1, 1876, from the commissioner of crown lands of the government of Hawaii to the testator of the Ahupuaa of Humuula, Island of Hawaii, comprising an area of about 1200 acres for 25 years from date, expiring March 1, 1901, but prior to testator's death extended for a term of seven years, or until March 1, 1908, at a nominal rent or rent free (this lease was valued at the inception of the trust at $5000 and will be referred to herein as the Ookala lease), (2) a lease dated May 27, 1884, from J. P. Mendonca to testator of about 2500 acres of land at Mokuelia, Waialua, Oahu, for 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1250 and taxes (this lease was valued at the inception of the trust at $7500 and will be referred to herein as the Mokuleia lease); (3) cattle, horses, mules, chickens, farm implements, household furniture, etc. (The horses and mules were valued at the inception of the trust at $2310; the value of the cattle, chickens, implements and furniture does not so far as we are able to ascertain appear in evidence); (4) cash in

hand of agents $816.59. There was no real estate. The estate at the inception of the trust had a value, the complaint alleges, of $20,000 or thereabouts. The Ookala lease was cultivated to sugar cane by the Ookala Sugar Company under a sublease made by the testator in his lifetime and afterwards renewed by the trustees for the full term of the head lease. The sublease reserved a part of the sugar grown on the lands as rent in kind from which the trustees received for the years 1893–1908, both [41] inclusive, a total of $34,854.34. There was no rent paid by the trustees to the government, their lessor. The testator resided on the Mokuleia lease and there conducted a ranching business on the greater part of the land and subleased the remainder. At the time of his death he was receiving from subleases of portions of the Mokuleia lease a total annual rental of $2723.50. The trustees under the power contained in the will carried on the testator's ranching business from the date of his death until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold realizing $4065 net. This sum has been invested by the trustees and the investment held by them as *corpus* of the estate. On December 9, 1898, a portion of the Mokuleia lease containing an area of about 800 acres was leased by the trustees to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar or the proceeds thereof grown thereon. The sublease to B. F. Dillingham was assigned to the Waiaula Agricultural Company,

and on July 2, 1902, the trustees subleased to the ~~Waialua Agricultural Company~~ for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like rental as in the lease to B. F. Dillingham. On or about April 28, 1906, when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet. The approximate total gross rent from the subleases of the Mokuleia lease beginning with the year 1894 and including the year 1919 is shown to have been $281,033.76. From this total the trustees have paid to Mr. Mendonca, their lessor, $1250 annually for 26 years, or $32,400, leaving $248,-533.76, from which of course such expenses as court costs, trustees' commissions, etc., the amount of which is not shown, should be deducted in order to ascertain the total net proceeds of said subleases. The trustees paid out yearly all cash received by them from every source except the sale of livestock and ranch movable assets, which netted $4065 as heretofore stated, first, to Mrs. Gay during her lifetime and after her decease to testator's children. The Ookala [42] lease, as already stated, has expired. There is nothing left of this part of the estate to represent it, all of the net proceeds received from the sale of sugar, the rent in kind, having been paid by the trustees to the tenants for life. If the trustees' method of administering the trusts is continued the same fate awaits the Mokuleia leasehold in 1934 unless all of testator's six children

now living, the youngest of whom will be about 45 and the eldest 57, die before that date. Evidence adduced at the hearing establishes a present sale value of the Mokuleia lease of $87,000 to $90,000, a value which is decreasing about $5000 annually. No evidence, other than the appraisement filed in the probate proceeding, of the value of either of said leaseholds at the date of the testator's death is shown.

The trustees allege in their complaint that they have "been advised by counsel that it is uncertain and doubtful from the language used in the will of the testator what the testator's intentions were as to the respective rights in the estate of the life tenants and remaindermen and that it is a matter of uncertainty and doubt whether under the provisions of said will and in view of the fact that the principal assets of the trust estate, namely, the said Mokuleia and Ookala leaseholds, were of a wasting and diminishing nature the trustees of the said estate were authorized in the past or will be authorized in the future to pay out all the net rents, income, issues and profits of the said estate to the life tenants without making provision out of said rents, income, issues and profits for the preservation of the *corpus* of the said estate for the benefit of the remaindermen, or whether there should not have been retained in the past and should not in the future be retained out of the said rents, income, issues and profits such sums as may be necessary for the purpose of restoring for the benefit of the remaindermen the capital or *corpus* of said estate

to the value thereof at the death of the testator," and it is to procure the advice of the Court on the question thus raised that this proceeding was instituted.

As will appear from a consideration of the question presented [43] our decision must turn principally upon the question of whether or not the rule laid down in Howe vs. Earl of Dartmouth, 7 Ves. 137 (1802), and ever since known by the name of that case, is applicable to this case. There the testator gave all his personal and landed estate to one for life and to others afterwards. The will contained no language which the Court could say amounted to a specific bequest of such personal estate as was the testator's at the time of his death. Some of the estate at the time of the testator's death was invested in wasting assets (long and short annuities) and some in unauthorized securities (bank stock). Held, that these wasting assets are to be converted in such way as to produce capital, bearing interest.

The rule as understood and applied by the English courts has been more clearly stated in later cases, a few of which we will now notice.

In McDonald vs. Irvine, 8 L. R. (Ch. Div.) 101, at p. 121, Lord Justice Thesiger made a short and very lucid statement of the rule as follows: "The rule itself is a simple one, founded upon the presumption, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and ef-

fectuating the presumed intention of the testator by the conversion into investments approved by the court of so much of the personalty as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests." In Lichfield vs. Baker, 2 Beav. 481, 483 (48 Eng. Rep. (Repr.) 1267), is to be found another very clear statement and application of the rule in the following language: "The only point on which I need call on the plaintiffs' counsel to reply, is on the extent of relief now to be granted. As to the other question, I take this [44] to be the rule of the Court, that when a testator has given an estate, or the residue of an estate, to persons in succession, as to one for life, with remainder to another person, the Court presuming that the testator intended that the remainderman should have something, will so deal with the property, if it be a property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intention, and give the remainderman something; for that purpose it will convert the perishable into a permanent property, and give the income which arises from it to the persons entitled for life in succession, and preserve the capital for the person entitled in remainder. That is the rule; and the court only acts upon the general intention of the testator, that something should be given to the person who is the donee in remainder; but if, upon the construction of the will, it appears the testator had another intention, that is to say, an intention to give to one or more persons who are

to take for lives or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect; and every one of the cases which have been cited, and every case which can arise, will turn upon this question of construction, whether you can find upon the face of the will an intention that the legatee for life shall enjoy the property in the way in which it stood at the testator's death, even to the extent of defeating the testator's intention to bequeath something to the remainderman. I believe that in all the cases which have been cited in opposition to the conversion, there have been words clearly indicating, from the testator's description of the property or some other circumstance, that the testator intended the donee to enjoy it for life, in the same way as it stood at his death." In Pickering vs. Pickering, 4 My. & Cr. 289, 41 Eng. Rep. (Repr.) 113, at 116 it is said: "All that Howe vs. Lord of Dartmouth (7 Ves. 137) decided—and [45] that was not the first decision to the same effect—is that, where the residue or bulk of the property is left *en masse,* and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in

such a state as will allow of its being so enjoyed. This cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed if no direction is given as to how the property is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook."

It is with the principle announced in the above cases in mind that the will is to be examined, from which we gather that it is after all a question of intention and the rule in Howe vs. Earl of Dartmouth is founded on what is presumed to be the intention of the testator where an estate is given to one for life and afterwards to others. The testator's presumable intention is that there shall be equality of enjoyment where there are no directions as to how the estate shall be enjoyed. It is the intention presumed by law in the absence of any contrary intention expressed by the testator, and being only a presumption of intention, it must give way to any intention expressed by the testator. When once you have arrived at the intention of the testator you must give effect to it notwithstanding [46] the rule in Howe vs. Earl of Dartmouth. Any other conclusion would be in conflict with our own decisions. Mercer vs. Kirtpatrick, 22 Haw. 644;

Fitchie vs. Brown, 18 Haw. 52; Rooke vs. Queen's Hospital, 12 Haw. 375.

Counsel for the life tenants argue that this will is taken out of the rule in Howe vs. Earl of Dartmouth by provisions in it which they say clearly show that it was testator's intention that his estate should be held by the trustees in the state in which he left it, paying the rents, income, issues and profits arising from and out of it to them, while the guardian *ad litem* for the remaindermen argues that there is nothing in the will which distinguishes it from the will in that case. From the fact that the will provides for *rents* to be paid to the life tenants and the further fact that the testator had no real estate the life tenants argued that the word "rents" could apply only to leaseholds and that the obligation to convert is thereby negatived. They cite Goodenough vs. Tremamondo, 2 Beav. 512 (48 Eng. Rep. (Repr.) 1280). There the will, which was not executed so as to pass real estate, after bequeathing specific legacies, provides: "And as to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, I give, devise and bequeath the same unto Anthony Angelo and Charles John Lawson, their executors, administrators, and assigns, in trust to permit the rents, issues, profits, interest, and annual proceeds thereof to be received and taken by my said son Richard Collier Andree, for and during the term of his natural life, for his own use and benefit; and from and after his decease, upon trust for Ann and Sophia, the two daughters of my said son Richard

Collier Andree, when they shall attain the age of twenty-one years, equally to be divided between them, share and share like. And I empower my said trustees and executors, after the death of my said son Richard Collier Andree, to apply the *rents,* interest, profits, and annual proceeds of my said [47] residuary estate and effects, for and towards the maintenance and education of the said Ann and Sophia Andree, until their respective shares shall become vested." Part of the estate consisted of a leasehold. The master of the rolls said that he could not declare this to be a case of conversion without striking out altogether the word "rents" which was twice repeated in the will and it appeared that there was no other property belonging to the testator except the leaseholds to which the term "rents" was applicable. Other cases are cited in support of this contention but this one seems to be the most nearly in point of any.

The case at bar is distinguished from Goodenough vs. Tremamondo primarily by the fact that the will in that case was not executed so as to pass real estate, while the will in the case at bar was not so restricted although the testator owned no real estate at the time of his death. Under these circumstances we cannot say that the word "rents" refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will in the form he made it had he acquired any.

Our conclusion as to the effect of the use of the word "rents" is supported by the decision in Pickup vs. Atkinson, 4 Hare, 624 (67 Eng. Rep. (Repr.) 797), where, after a specific gift of certain leasehold houses to the testator's wife for life with remainder over to his nephew, the testator bequeathed the "rents and profits, dividends and interest" of all the residue of his property to his wife for her life with gift over of the whole of the residue after her decease to other persons, and there was no freehold. The vice-chancellor, in discussing the question, said: "If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds [48] in specie, I do not know how to stop short of the conclusion that any other word by which income may be described is to have the same effect with reference to the property in respect to which it is paid. The use of the word 'dividends,' for example, in another case, ought to be admitted as sufficient evidence that every portion of the residue, though not specifically bequeathed, the annual profits of which are returned under the name of dividends, was also intended to be enjoyed in its existing state, which would include every species of property yielding dividends from consols, which the Court considers a permanent fund, down to the lowest mercantile security; and the same argument in strictness would apply to the word 'interest' where the property yielded income in the form of interest. It appears to me

impossible to admit that conclusion. I think the correct reasoning upon the words 'rents and profits, dividends and interest' of a general residue, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does not give a specific character to the bequest, because the whole clause is in effect a mere residuary bequest. I think the same observation applies to a case like this; the enumeration of particulars of income being nothing more than a gift of the income of the residue, which means income only. This conclusion appears to me to be put beyond dispute when it is considered that the words 'rents, profits, dividends and interest' in this case means rents, profits, dividends and interest, not of the property the testator then had, but of such property, real, personal or mixed, as he might happen to have at the time of his death. * * * The only two cases which bear any analogy to the present are Pickering vs. Pickering and Goodenough vs. Tremamondo (2 Beav. 512). In Pickering vs. Pickering the word 'rents' occurred; but it does not appear to me that the word was relied upon as alone constituting [49] a ground for preserving the property in specie. There are other and very elaborate reasons given for that conclusion. In Goodenough vs. Tremamondo the word 'rents' occurred twice; and Lord Langdale appears to have thought that the use of it the second time was conclusive evidence that the testator treated his property as unconverted when the estate in remainder fell into pos-

session, and therefore that the legacy was specific in the direct sense of that term. And he says, further, there was no other property belonging to the testator, except the leaseholds, to which the term 'rents' was applicable, which shows that he considered the bequest as specific in the strict sense of that term. In this case any property, freehold or leasehold, to which the testator might have been entitled at his death would satisfy the gift; and that, in my opinion, shows that the testator could not have had any particular object in his mind to which the direction was applicable but that he referred to the income of his property generally." See also Chambers vs. Chambers, 15 Sim. 183 (60 Eng. Rep. (Repr.) 587); Morgan vs. Morgan, 14 Beav., 72 (51 Eng. Rep. (Repr.) 214); Mills vs. Mills, 7 Sim. 501 (58 Eng. Rep. (Repr.) 929); Boardman vs. Mansfield, 79 Conn. 634 (66 Atl. 169, 12 L. R. A. (N. S.) 793–6).

But the life tenants do not rely alone or principally upon the use of the word "rents" to support their contention. Their main argument is based upon that portion of the will which directs the trustee to carry on the business of ranching at Mokuleia so long as it can be done profitably and without loss and invests them with a discretionary power to sell their property at Mokuleia. As applied to the Mokuleia lease we think their reasoning is sound. If the conversion was required at all it must take place as soon after testator's death as may be. The direction to the trustees to "manage, conduct and carry on the business of ranching and

stock raising at [50] Mokuleia'' and the discretion with which the testator invested the trustees in the matter of selling ''the property at said Mokuleia'' are both inconsistent with an intention that the property was to be converted, for if they had a right to retain the property until ''in their discretion they think that a sale of all the property at Mokuleia would by reinvestment of the money realized from such sale of such property be benefited and inure to the benefit of or increase the trust estate created under the will'' they may retain it for years, or, indeed, may never convert it at all, and if so they are only exercising the discretion given to them by the will. In re Bates, L. R. 1907 (1 Ch.) 22; Alcock vs. Sloper, 2 Myl. & K. 699 (39 Eng. Rep. (Repr.) 1111).

Neither do we see any merit in the contention of the remaindermen that since the trustees ceased to carry on the ranching business at Mokuleia and subleased the lands they in effect sold the head lease to be paid for in instalments and that the amounts received for the sublease are *corpus* instead of income. If, as we have concluded, the trustees were authorized under the terms of the will to retain the head lease whatever sums they received for its use were income and the life tenants entitled to receive it.

But what we have said as to the effect of the above provisions upon the right of the trustees to retain the Mokuleia lease has no application to the Ookala lease and there is no other language in the will which in our opinion has any reference to the

manner in which the Ookala lease was to be enjoyed. The Circuit Judge apparently considered that the question presented related entirely to the management of the estate in the future and dismissed the Ookala lease with the statement that it had already expired. Since the trustees ask for instructions as to their duties in the execution of the trust and that all proper accounts may be taken and all necessary directions given for carrying the testator's intention into [51] execution we think the whole matter should be settled in this proceeding. The restoration of the *corpus* of the estate represented by the Ookala lease is we think as much involved as if the case had been commenced by the remaindermen on a bill for an accounting. There are not, however, before us sufficient facts to enable us to enter a decree.

We think, therefore, that the cause should be remanded with instructions to the Circuit Judge to modify the decree appealed from so as to require of the trustees an accounting in accordance with the views herein expressed unless within five days from the filing of this opinion the parties can and do agree upon sufficient facts to enable us to enter a proper decree. Unless such an agreement is filed within the time above stated an order will be entered remanding the cause as above stated.

W. L. STANLEY filed a brief for the trustees but did not argue.

H. EDMONDSON (HENRY HOLMES with him on the brief), for the minor respondents.

L. J. WARREN (W. O. SMITH and MOTT-SMITH & LINDSAY with him on the brief), for the life tenants.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. October Term, 1920. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Opinion. Filed April 5, 1921, at 3:50 P. M. J. A. Thompson, Clerk. [52]

In the Supreme Court of the Territory of Hawaii.
October Term, 1920.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANNATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, AL-

BERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, Alice K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor.

No. 1273.

PETITION FOR REHEARING.

Filed April 16, 1921. Decided May 7, 1921.

COKE, C. J., KEMP, J., and Circuit Judge FRANKLIN in Place of EDINGS, J., Absent.

Opinion of Court on Petition for Rehearing.

PER CURIAM: The minor respondents in the above-entitled cause, referred to in our opinion filed April 5, 1921, as remaindermen, have filed a petition for a rehearing asking that we instruct the trustees as to the method that should be followed in arriving at the *corpus* or capital value of the Ookala leasehold and (or) that we enter a decree that the *corpus* or capital value thereof was $34,-854.34. They assert that the record contains sufficient facts to enable us to enter a decree. With this contention we do not agree. But even if the facts were all before us it would be discretionary with us as to whether we would enter a decree [53] or remand the cause to the circuit judge. (Hind vs. Wilder's S. S. Co., 13 Haw. 174, 176.) We think it only fair to all parties that the cause be remanded to the Circuit Judge where a full hearing can be had and the amount for which the trustees must account be properly ascertained. Neither do we think that it would be proper for us at this time to undertake to issue instructions as to the

method to be followed in arriving at the value of the Ookala leasehold there being nothing in the record to indicate that the Circuit Judge is in need of such instructions.

For the reasons set forth the petition for rehearing is denied and in compliance with the statement in our opinion of April 5 "unless within five days from the filing of this opinion the parties can and do agree upon sufficient facts to enable us to enter a proper decree * * * an order will be entered remanding the cause" the cause is remanded to the Circuit Judge for further proceedings not inconsistent with that opinion.

H. HOLMES and H. EDMONDSON, for the petition.

By the Court,
J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. October Term, 1920. H. Focke et al., Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Decision on Petition for Rehearing. Filed May 7, 1921, at 9:35 A. M. J. A. Thompson, Clerk, [54]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

No. 1273.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY et al.,

Respondents.

Notice of Decision on Appeal.

To the Honorable JAS. J. BANKS, Third Judge of the Circuit Court of the First Circuit, Territory of Hawaii:

Please take notice that in the above-entitled cause the Supreme Court has filed the following decision on appeal:

"DECISION ON APPEAL.

"In the above-entitled cause, pursuant to the opinion of the above-entitled court filed herein on the 5th day of April, 1921, and no agreement having been filed by the parties upon which a proper decree may be entered in this Court, the said cause is hereby remanded to the Circuit Judge of the court below with instructions to modify the decree appealed from so as to require of the trustees an accounting in accordance with the views expressed in said opinion.

"Dated, Honolulu, T. H., May 27, 1921.

"By the Court:

[Seal] "J. A. THOMPSON,

"Clerk, Supreme Court."

Dated, Honolulu, T. H., May 27, 1921.

J. A. THOMPSON,
Clerk, Supreme Court.

SMITH, WARREN & STANLEY,
Attorneys at Law,
Honolulu, Hawaii.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al. Notice of Decision on Appeal. Filed May 27, 1921, at 4:00 P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys, Honolulu, T. H. [55]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

BILL FOR INSTRUCTIONS.

H. FOCKE, et al., Trustees Under the Will and of the Estate of JAMES GAY, Deceased,
Complainants,

vs.

LLEWELLYN NAPELA GAY, et al.,
Respondents.

Decision.

On the appeal heretofore taken in this case it has been determined by the Supreme Court that the "Ookala lease" which belonged to the testator's estate should upon the testator's death have been converted by the trustees into cash and the proceeds held as part of the *corpus* of the estate, instead of having been held, as was the Mokuleia lease, and all of the rents therefrom paid as income to the life tenants; and that an accounting should now be taken to determine what amount should be restored as the *corpus* represented by the Ookala lease in order that as between the life tenants and the remaindermen the latter shall have that amount restored and held for them as capital.

The parties having now presented evidence and argument upon the issues involved, I am of the opinion that the figure of $5,000, which was placed in the inventory of the estate shortly after the testator's death, as the "value" of the Ookala lease, cannot equitably be taken as a proper basis for any decision in this case. That this lease might not have brought much more than that sum had it then been sold may be [56] conceded, but the fact is that it was not sold, and that a total net sum of $34,-329.24 was actually realized by the trustees out of this property. It is the sum of $34,329.24 which was actually so received by the trustees from this lease which must now be apportioned into sums representing income for the life tenants and capital for the remaindermen.

I am of the opinion that the proper method of determining what part of this sum of $34,329.24 is income and what part is capital would be to assume that each sum, as received by the trustees, should have been considered as property belonging to the estate of which part should have been invested as capital and part distributed as income; and that the portion constituting capital should be ascertained by finding what sum if received at the death of the testator, would amount with interest at six per cent, and making annual rests, to the whole sum actually received. Adopting this method I find that $20,668.35 would be that sum, and was the true actuarial value of the Ookala lease in 1893.

The life tenants offered evidence showing that when Mr. Gay made his will on May 25, 1893, he was in a very low and dying condition and therefore sent his physician for his lawyer to come and prepare this will in place of one already existing; the purpose being to show that the will here in question was made by him with reference only to the estate which he then already had and was disposing of, and, therefore, that in using the word "rents" in the clause "rents, income, issues and profits arising from and out of said trust estate," when he did not then own any real estate, he meant "rents" from both Ookala and Mokuleia leases rather than to rents from any real estate he might possibly yet acquire before his death. This [57] was objected to by the guardian *ad litem* for the re-

maindermen upon the ground that it was outside the scope of the issues left to be determined by this Court under the decision of the Supreme Court, and that it was incompetent, irrelevant and immaterial, and that it would tend to change the terms of the will by oral evidence. But as this Court did not on the previous hearing either consider or make any finding as to the effect of the word "rents" as used in the will, and the decision of the Supreme Court on this point rested upon a record in which that issue was not fully gone into, I think the life tenants are entitled to have the fact of the testator's dying condition shown by the record as being one of the facts and circumstances surrounding the execution of the will. I hold, however, that it would not affect the question of the duty of the trustees to have converted the Ookala lease as has now been directed by the Supreme Court.

A decree will therefore be entered requiring the trustees to set apart out of the accumulated income now in their hands the sum of twenty thousand six hundred sixty-eight and 35/100 Dollars ($20,668.35) as capital to which the remaindermen will be entitled on the termination of the trust, and which sum will in the meantime be invested to pay the income of the life tenants.

Dated, Honolulu, T. H., August 1, 1921.

[Seal] JAS. J. BANKS,
Third Judge First Circuit Court.

[Endorsed]: Filed at 2:10 o'clock P. M. August 1, 1921. B. N. Kahalepuna, Clerk. [58]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE et al., Trustees Under the Will and of the Estate of JAMES GAY, Deceased,
Complainants,

vs.

LLEWELLYN NAPELA GAY, et al.,
Respondents.

Decree.

Pursuant to the decision filed herein on this first day of August, 1921, and the separate order made and filed this day respecting the allowance and payment of counsel fees and disbursements in the above-entitled cause,—

IT IS ORDERED, ADJUDGED AND DECREED that H. Focke and H. M. von Holt, as trustees under the will and of the estate of James Gay, deceased, be and they are hereby instructed and directed to set apart out of the income of the trust estate the sum of Twenty Thousand and Six Hundred Sixty-eight and 35/100 Dollars ($20,668.35) as capital to which the remaindermen will be entitled on the termination of the trust, less the amounts which the trustees are required to pay therefrom on account of counsel fees and disbursements under the separate order in that behalf this day filed.

Dated, Honolulu, T. H., August 1, 1921.

[Seal] JAS. J. BANKS,
Third Judge, First Circuit Court.

[Endorsed]: Filed at 2:10 o'clock P. M. August 1, 1921. B. N. Kahalepuna, Clerk. [59]

In the Supreme Court of the Territory of Hawaii.

October Term, 1921.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, et al.

No. 1348.

Appeals From Circuit Judge First Circuit.

Hon J. J. BANKS, Judge.

Argued January 6, 1922.

Decided February 28, 1922.

COKE, C. J., KEMP and EDINGS, J. J.

Trusts—Wasting Asset—Value Ascertained.

Whenever a leasehold which should have been converted into a permanent investment at the inception of the trust is held by the trustees until the expiration of the lease and it afterwards becomes necessary to ascertain its value it is proper to consider what it produced in order to ascertain its value at the time it should have been converted.

Appeal and Error—Final Decree—Effect of Appeal from.

A general appeal from a final decree in equity brings up for review all interlocutory orders, not appealable as of right, which deal with the issues in the case.

Same—Same—Same.

An appealable order made in a proceeding growing out of the suit but foreiin to the subject matter of it is not brought up for review by a general appeal from the main decree. [60]

Opinion of the Court by Kemp, J.

The complainants as trustees under the will and of the estate of James Gay, deceased, filed a bill in equity for instructions as to their duties under the will. From the decree entered by the Circuit Judge the minor respondents, remaindermen, through their guardian *ad litem* prosecuted an appeal to this court. Our opinion on that appeal (26 Haw. 1) is referred to for the history of the case. It is sufficient to say here that the cause was remanded with instructions to the Circuit Judge to modify the decree appealed from so as to require the trustees to set aside as capital the value of the Ookala leasehold. When the matter again came before the Circuit Judge on the remand he heard evidence as to the rentals produced by the Ookala leasehold from the death of the testator to the expiration of the lease and from the evidence and calculations which he had an actuary make found its value to be $20,668.35. A decree was accord-

ingly entered requiring the trustees to set aside that amount as capital or *corpus* of the estate. In order to arrive at that value each installment of rent received by the trustees from said leasehold was considered to be part income and part capital. To determine what portion of each installment of rent constituted capital calculations were made by the actuary to ascertain what sum put out at six per cent interest with annual rests on the date of testator's death would amount to each installment actually received at the time it was received. Each installment was figured separately and the sum of the amounts thus ascertained equals the value found by the Circuit Judge. The remaindermen being dissatisfied with the decree in this respect have again appealed to this court.

Appellants complain because the Circuit Judge entered a new decree instead of modifying the former decree. This constitutes at most an immaterial departure from the instructions contained [61] in the order remanding the cause and is not prejudical to the rights of the appellants. The Circuit Judge was compelled to hear evidence in order to comply with the order of this Court and having done so it was not improper for him to enter such decree as the evidence warranted.

On the question of the correctness of the decree it is argued that the following four courses were open to the trustees at the inception of the trust: (1) They could have valued the Ookala leasehold at the inception of the trust and paid to the tenants for life six per cent interest on such value;

(2) they could have sold the leasehold, invested the proceeds and given the income to the life tenants; (3) they could have invested the rents as received and paid the income to the life tenants, and (4) they might (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen. It is further argued that what the trustees did was to adopt the fourth course except that they did not exact security of the life tenants for the preservation of the fund.

We are not able to concede either that the trustees had the four courses open to them or that they have adopted the fourth course. The only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen. Not having pursued this course their error must now be corrected by requiring them to set aside as capital or *corpus* of the estate a sum equal to the one which they should have had for that purpose at the time. At the time of the testator's death the value of the Ookala leasehold was uncertain because the amount it would produce was uncertain, but the information now [62] makes its true value as of that date at least theoretically ascertainable, and the calculations which the Circuit Judge had the

actuary make based on the receipts from the leasehold showed that value.

In Kinmouth vs. Brigham, 5 Allen 270, 279, where a portion af the trust estate consisted of an investment by a special partner in a trading partnership, the Court after stating that such investment was one which the Court could not sanction said: "It is obviously difficult in this case to determine what was the value of the investment at the testator's decease by any other mode than a computation based upon the whole product ultimately realized from it. * * * We think, therefore, that upon a just construction of the will equity will require that the profits received by the executors from the special partnership should not be regarded or treated exclusively as income but that they be treated when received from time to time as property belonging to the estate, a part of which is to be invested as capital and a part distributed as income; which parts are to be ascertained by finding what sum if received at the death of the testator would amount, with interest at six per cent and making annual rests, to the sum actually received, at the time it was received; and that the sum so found should be invested as principal and the remainder distributed as income." The Circuit Judge evidently had this case before him and was largely influenced by it in adopting the method used to ascertain the capital value of the Ookala leasehold.

In this case, as in the Kinmouth case, it is obviously difficult to determine what was the value of

the investment at the testator's death by any other mode than a computation based upon the whole product ultimately realized from it. We therefore hold that the Circuit Judge committed no error in thus determining the value of said leasehold. But we are not to be understood as holding that in every such case six per cent should be taken as the correct [63] rate of interest. Whenever interest is to be allowed for the failure to pay money when it is due the law knows no other rate than the one established by law, but here we are to ascertain between the tenants for life and the remaindermen what part of the gross sum now in hand shall be treated as capital and what part as income, and when we are called upon to find out what sum at a particular date if invested by the trustees would have been sufficient to produce with its income the gross sum now on hand we must look to the actual income that can be obtained from authorized investments and not to the rate of interest established by law. (Edwards vs. Edwards, 183 Mass. 581, 67 N. E. 658; Lawrence vs. Littlefield, 215 N. Y. 561, 109 N. E. 611; Furniss vs. Cruickshank, 130 N. E. (N. Y.) 625.) No point is made of the rate of interest used in the computations in this case, the objection being to the method used rather than to the details of applying the method.

Shortly after the case was remanded to the Circuit Court Mr. Edmondson, guardian *ad litem* for the minor respondents, filed a motion for the allowance to him of $2000 for his services in the

Supreme Court on the former appeal and for the further sum of $1000 for the services of counsel employed by him to assist him on that appeal. At the conclusion of the hearing as to the value of the leasehold in question evidence was heard as to the nature, extent and value of the services of the guardian *ad litem* after which the Circuit Judge simultaneously with the entry of the decree entered a separate order allowing him a fee of $1000 "for his services rendered in this case in the Supreme Court to date, and a further sum of $1000 for services of counsel employed by the said" guardian *ad litem*" * * * which total sum was directed to be apportioned between and paid forthwith out of the capital and income respectively in the proportions that $20,668.35 and $13,-060.89, respectively, bear to the sum of $34,329.34." Also upon the oral [64] application of counsel for the trustees made at the time of the entry of the order it was further ordered that the sum of $750 be paid to him for his services as counsel for the trustees on the appeal and to date, which sum was similarly apportioned between and to be paid out of the capital and income. From this order Mr. Edmondson has appealed and urges that the $1000 fee allowed him is inadequate.

The evidence as to the value of the services of the guardian *ad litem* is conflicting. The Circuit Judge in order to determine what was a reasonable fee for the guardian *ad litem* necessarily acquainted himself with the nature and extent of the services rendered. If he desired more definite information

than was acquired during the progress of the trial he was then at liberty to hear evidence as to the nature and extent of the services rendered for which the fee was sought. He was also at liberty to take the judgment of professional men as to the value of such services but such evidence is not necessarily controlling even when it is not conflicting. When the Circuit Judge had familiarized himself by either method with the nature and extent of the services and the other circumstances generally it became his duty in the exercise of a sound discretion to fix the amount of the fee to be allowed (Guardianship of Humeku, 15 Haw. 394; Magoon vs. Fitch, 16 Haw. 13), and unless it appears that he has abused that discretion his action in fixing the amount of the fee will not be disturbed on appeal. In this case the guardian *ad litem* had already been allowed a fee of $1000 for his services in the first trial in the Circuit Court. For prosecuting the appeal from the decision of the Circuit Judge in that trial he has now been allowed $1000 for counsel which he employed to assist him and $1000 for his own services on appeal and the second hearing in the Circuit Court. Considering the benefits resulting from the guardian *ad litem's* services and all the surrounding [65] circumstances we regard the amount allowed by the Circuit Judge as very liberal. It cannot be said therefore that the Circuit Judge abused the discretion reposed in him.

It is also argued that that portion of the order apportioning these counsel fees between capital

and income is erroneous. The first question which presents itself is one which we have raised and called upon counsel to discuss, viz., whether or not the issue is raised by either of the appeals. The appeal of Mr. Edmondson, although a general appeal from the order in question, does not raise the issue for he has not such an interest in the subject matter as entitles him to raise it. In fact it is not contended that the issue is raised by his appeal. It is contended, however, in behalf of the remaindermen that their appeal from the decree does raise the issue of the correctness of the apportionment although contained in an order entirely separate from the decree from which they have appealed. It is well settled that an appeal from a final decree in equity brings up for review all interlocutory orders, not appealable directly as of right, which deal with issues in the case. (Lee Chu vs. Noar, 14 Haw. 648; Scott vs. Stuart, 22 Haw. 641.) Whether such an appeal would bring up for review an intermediate order directly appealable, because final in its nature, which settles some issue in the case was not decided by either of the cases cited, nor is it necessary for us to decide it here. But the case of Scott vs. Stuart does decide that an appealable order made in a proceeding growing out of the suit but foreign to the subject matter of the suit would not be up for review upon an appeal from the decree and that an order or decree directing the payment of money other than the payment into court for further disposition is final in its nature and appealable. There the Court

was discussing an order entered in a partition proceeding but made in response to a motion of an attorney, who had [66] theretofore been appointed master in chancery in said partition proceeding, for the allowance to him of a fee for services which he had rendered in obedience to an order of the Circuit Judge in resisting an application of one of the parties to said partition proceeding for a writ of prohibition against himself and the Circuit Judge by which said party sought to prevent further action under said order appointing him master. In response to said motion the Circuit Judge fixed his fee and ordered it paid by the clerk out of funds on deposit in court in said partition proceeding. In discussing that order this Court said: "It should be pointed out, however, that that order was an appealable one, and as it was made in a proceeding independent of the suit for partition and foreign to the subject matter of that suit, though growing out of it, the order would not, upon final decree, be up for reconsideration or review." Here the order in question was made in the case on trial but in response to the motions of counsel for the trustees and the remaindermen to have their fees for services in a former appeal allowed and would seem to be ruled by the holding in Scott vs. Stuart, unless there are other facts which distinguish it. The only fact which has a tendency to distinguish this order from that is a recital in the decree following the portion ordering the trustees to set aside as capital the value of the Ookala leasehold

to the effect that the remaindermen will be entitled to this sum on the termination of the trust "less the amount which the trustees are required to pay therefrom on account of counsel fees and disbursements under the separate order in that behalf this day filed."

After careful consideration of this phase of the matter we are of the opinion that the recital in the decree could have no bearing on the question unless it had the effect of making the order allowing counsel fees a part of the decree. That it does not have this effect seems clear. The decree orders the full value of the Ookala leasehold as found by the Circuit Judge set aside by the [67] trustees as capital and the further recital that the remaindermen will be entitled to that sum on the termination of the trust less the amount of fees ordered paid out of it is of no effect for the reason that such recital could not have the effect of irrevocably fixing the amount to which the remaindermen will be entitled at the termination of the trust. It is not impossible that further sums may be ordered paid out of capital before the termination of the trust, in which event the remaindermen would not be entitled to that amount. It seems clear to us that the most that can be said of the order in question is that it was made in a proceeding which was collateral to the case on trial. It did not settle any issue in that case and is foreign to the subject matter thereof although growing out of it. It necessarily follows that the general appeal of the remaindermen from the decree does not bring up for review

the order allowing and apportioning the payment of counsel fees.

Both the decree and the order should be affirmed and it is so ordered.

W. L. STANLEY, for the trustees.

H. EDMONDSON, in proper person and for the minor respondents.

L. J. WARREN (W. O. SMITH with him on the brief), for the life tenants.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: No. 1348. Supreme Court Territory of Hawaii. October Term, 1921. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Opinion. Filed February 28, 1922, at 11:20 A. M. J. A. Thompson, Clerk. [68]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY,

ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decree.

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 28th day of February, 1922, the decree and order, both dated the 1st day of August, 1921, of the Court below are affirmed.

Dated, Honolulu, T. H., March 8, 1922.

By the Court.

[Seal] ROBERT PARKER, Jr.,
Assistant Clerk, Supreme Court.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Decree. Rec'd and filed in the Supreme Court, Mar. 8, 1922, at 2:55 o'clock P. M. Robert Parker, Jr., Assistant Clerk. H. Edmondson, Honolulu, T. H., Attorney for Minor Respondents. [69]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Petition for Appeal.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii.

Now come Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, by Harry

Edmondson, their Guardian *ad Litem,* and feeling themselves aggrieved by the final decree of this Court entered herein on the eighth day of March, A. D. 1922, hereby pray that an appeal may be allowed from the said decree to the [70] United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that a transcript of record, proceedings and documentary exhibits upon which said decree was made duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, petitioners herewith present their assignment of errors.

Your petitioners further show that said decree was rendered in an action in equity and that the amount involved, exclusive of costs, exceeds $5000.00.

H. EDMONDSON,
Guardian *ad Litem* for the Minor Respondents-Appellants.

Territory of Hawaii,
City and County of Honolulu,—ss.

H. Edmondson, being duly sworn, states that he is guardian *ad litem* for the petitioners named in the foregoing petition.

That he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge.

And further, that the amount involved in the cause aforesaid, exclusive of costs as shown by

the record in said cause, exceeds the value of $5000.00.

H. EDMONDSON.

Subscribed and sworn to before me this 28th day of June, 1922.

[Seal] ALEXANDER A. HOBSON,
Notary Public, First Judicial Circuit, Territory of Hawaii. [71]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, LLEWELLYN NAPELA GAY, a Minor,

Respondents.

Assignment of Errors on Appeal.

Now come the appellants, Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, by Harry Edmondson, their guardian *ad litem,* and in connection with their petition for appeal say that in the record, proceedings, decisions and decree aforesaid manifest error has intervened to the prejudice of the appellants, to wit: [72]

1. The Court erred in not holding that, under the terms of the will dated May 25, 1893, of James Gay, deceased, the net rents, or, their actuarial value as of the testator's death on May 28, 1893, derived from subleases of certain leasehold property held by the testator, at the time of his death, consisting of about 2500 acres of land situate at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, (hereinafter referred to as the "Mokuleia lease") form part of the *corpus* of testator's estate given in trust for testator's grandchildren, to wit: the minor respondents above-named appellants.

2. The Court erred in *find* and holding that, under the terms of said will, whatever sums the trustees received for the said Mokuleia lease, to wit: the net rents derived from the sublease thereof, were income and that the life tenants (being all but one of testator's children named in his will

and the issue of one deceased child) were entitled to receive it.

3. The Court erred in not holding under the terms of the said will that it was open to the trustees upon receiving proper security to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Mokuleia lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of reinvestment of the net rents which comprised part of the *corpus* of the said estate.

4. The Court erred in not holding under the terms of said [73] will that the trustees thereof, in subleasing all the land comprised in the said Mokuleia lease for the unexpired period except the last few days of the said term thereof, in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such subleases or their value as of testator's death form part of the *corpus* of testator's estate.

5. The Court erred in finding and holding under the terms of the said will that the trustees thereof did not by subleasing all the land comprised in the said Mokuleia lease, in effect, sell the said Mokuleia lease at a price to be paid for in installments; and, that the net amounts received from such subleases were not *corpus* but income of the estate payable to the life tenants.

6. The Court erred in not holding under the terms of the said will that the net rents amounting in the aggregate to $34,329.24, received from subleases of certain leasehold property held by the testator at the time of his death, consisting of about 1200 acres of land situate at Humuula, Ookala, Island of Hawaii, for a term of 25 years extended for a further term of 7 years and ultimately expiring March 1, 1908 (hereinafter referred to as the "Ookala lease"), all formed part of the *corpus* of testator's estate.

7. The Court erred in finding and holding under the terms of said will that only $20,668.35, a part of $34,329.24, the net rents received by the trustees from subleases of the land comprised in the said Ookala lease, should have been invested [74] as capital or *corpus* of the estate; and that the balance of $13,660.89, a part of said net rents, should be distributed to life tenants as income.

8. The Court erred in not holding under the terms of said will that it was open to the trustees, upon receiving proper security, to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Ookala lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of reinvestment of the net rents which comprised part of the *corpus* of the said estate.

9. The Court erred in finding and holding under the terms of said will that the trustees at the

inception of the trust might not (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen, and that the only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen.

10. The Court erred in finding the issues on the construction of the will for the life tenants, respondents above named other than said minor respondents.

11. The Court erred in not finding the issues upon the construction of the will for the minor respondents appellants. [75]

12. The Court erred in decreeing that the decree appealed from should be affirmed.

13. The Court erred in not decreeing that the decree appealed from should be set aside.

14. The decree is against the manifest intention of the testator as expressed in his will.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

WHEREFORE appellants pray that the decree of the Supreme Court of the Territory of Hawaii may be reversed and remanded with directions to the Supreme Court of the Territory of Hawaii to enter a decree that the net rents received and to

be received by the trustees of the will of James Gay, deceased, or the value thereof, from the Mokuleia lease and the Ookala lease, are part of the *corpus* of the estate of James Gay, deceased, and should be restored thereto, or security for the restoration thereof taken from the life tenants, and should be held in trust for the grandchildren of the testator as provided in his said will.

Dated at Honolulu, Territory of Hawaii, this 28th day of June, 1922.

_____.

HARRY EDMONDSON,
Guardian *Ad Litem* for Petitioners-Appellants.

[76]

Received a copy of the within written petition for appeal and assignment of errors on appeal, and receipt of a true copy thereof this 28th day of June, 1922, is hereby admitted.

W. L. STANLEY,
Attorney for Complainants-Appellees.
W. O. SMITH and
L. J. WARREN,
Attorneys for Respondents Other than Minor Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Petition for Appeal and Assignment of Errors on Appeal. Rec'd. and filed in the Supreme Court June 30, 1922, at 10:12 o'clock A. M. Robert Parker, Jr., Deputy Clerk. [77]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Allowing Appeal.

Upon reading and filing the foregoing petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon consideration of the assignment of errors presented and filed therewith,—

IT IS ORDERED that the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby allowed.

Dated at Honolulu, Territory of Hawaii, this 30th day of June, 1922.

[Seal] E. C. PETERS,

Chief Justice, Supreme Court of the Territory of Hawaii. [78]

Received a copy of the within written order allowing appeal and receipt of a copy is hereby admitted this 30th day of June, 1922.

W. L. STANLEY,

Attorney for Complainants-Appellees.

W. O. SMITH,

L. J. WARREN,

Attorneys for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Allowing Appeal. Rec'd and filed in the Supreme Court June 30, 1922, at 11:45 o'clock A. M. Robert Parker, Jr., Deputy Clerk. [79]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS that Harry Edmondson, of the City and County of Honolulu, Territory of Hawaii, as principal, and the United States Fidelity and Guaranty Company, a corporation duly authorized to carry on a bonding business in the Territory of Hawaii, as surety, are held and firmly bound unto H. Focke and

H. M. von Holt, trustees under the will and of the estate of James Gay, deceased, complainants above named, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay and Frida Gay, some of the respondents above named, hereinafter called the appellees, in the sum of $500.00 to be paid to said appellees, to which payment well and truly to be made we bind ourselves and our assigns jointly and severally by these presents. [80]

THE CONDITION OF THIS OBLIGATION IS AS FOLLOWS:

WHEREAS the minor respondents above named by Harry Edmondson, their guardian *ad litem,* appellants, have taken an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the said Supreme Court entered on the eighth day of March, A. D. 1922, in the above-entitled suit;

NOW, THEREFORE, if the above-named appellants shall prosecute the said appeal to effect and answer to all costs that may be adjudged if they shall fail to make good their appeal then this obligation is to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 30th day of June, 1922.

HARRY EDMONDSON,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By HERMAN LUIS, (Seal)
Attorney in Fact,
Surety.

Approved as to form, sufficiency and amount this 30th day of June, 1922.

[Seal] E. C. PETERS,
Chief Justice of the Supreme Court, Territory of Hawaii. [81]

Service of the within appeal bond and receipt of a copy is hereby admitted this —— day of June, A. D. 1922.

_____,
Attorney for Complainants-Appellees.

_____,
Attorney for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Appeal Bond. Rec'd and filed in the Supreme Court June 30, 1922, at 4:00 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [82]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Citation.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America to H. Focke and H. M. von Holt, Trustees Under the Will of the Estate of James Gay, Deceased, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, and Frida Gay, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Territory of [83] Hawaii and filed in the Clerk's office of said court on the 30th day of June, A. D. 1922, in the cause wherein Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, by Harry Edmondson, their guardian *ad litem,* are appellants and you are appellees, to show cause, if any, why the decree rendered against said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the hand and seal of the Honorable the Chief Justice of the Territory of Hawaii this 1st day of July, in the year of our Lord one thousand nine hundred and twenty-two.

E. C. PETERS,

Chief Justice, Supreme Court of Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,

Deputy Clerk of the Supreme Court. [84]

Service of the within citation and receipt of a copy is hereby admitted this 1st day of July, A. D. 1922.

W. L. STANLEY,
Attorney for Complainants-Appellees.
W. O. SMITH,
L. J. WARREN,
Attorneys for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii, H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Citation. Rec'd and filed in the Supreme Court, July 1, 1922 at 11:42 o'clock A. M. Robert Parker, Jr., Deputy. [85]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. VON HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a

Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including September 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of September, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [86] other papers as part of said record.

Dated at Honolulu, T. H., July 15, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,

Deputy Clerk, Supreme Court. [87]

Receipt of a copy of the within written order is hereby admitted this 17th day of July, 1922.

W. L. STANLEY,
By A. H.
Attorneys for Complainants-Appellees.
SMITH & WARREN,
Per R. A. V.,
Attorneys for Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including September 30, 1922, for Preparation and Transmission of Record. Rec'd and filed in the Supreme Court, July 17, 1922, at 1:50 o'clock P. M., and Issued for Service. Robert Parker, Jr., Deputy. Returned at 3:55 o'clock P. M. July 17, 1922. Robert Parker, Jr., Deputy Clerk. [88]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN

FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including November 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of November, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [89] other papers as part of said record.

Dated at Honolulu, T. H., September 18th, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,

Deputy Clerk, Supreme Court.

Consented to:

W. O. SMITH,

Per R. A. V.,

L. J. WARREN,

Per R. A. V.,

Attorneys for Respondents–Appellees. [90]

Service of copy of the within order is hereby admitted this 18 day of Sept., 1922.

W. L. STANLEY,

Per R. A. V.,

Attorney for Complainants-Appellees.

W. O. SMITH,

Per R. A. V.,

L. J. WARREN,

Per R. A. V.,

Attorneys for Respondents–Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including November 30, 1922, for Preparation and Transmission of Record. Rec'd and filed in the Supreme Court, Sept. 18, 1922, at 2:45 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [91]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Stipulation Re Taking Appeal Under Rule 75 (Supreme Court Equity Rules).

Doubt having arisen as to the proper method by which an appeal should be taken in an equity case from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals of the Ninth Circuit, the parties to the above-entitled cause do hereby state their understanding that such

a case is governed by Rule No. 75 of the Equity Rules of the Supreme Court of the United States, and do hereby stipulate that such appeal may be taken as provided by said Rule No. 75.

Dated, at Honolulu, T. H., November 13, 1922.

W. L. STANLEY,
Counsel for Complainants (Appellees).
WILLIAM O. SMITH and
L. J. WARREN,
Counsel for Life Tenants, Respondents (Appellees).
H. EDMONDSON,
Counsel for Minor Respondents (Appellants).

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Defendants. Stipulation. Rec'd and filed in the Supreme Court, Nov. 15, 1922, at 10:50 o'clock A. M. Robert Parker, Jr., Deputy Clerk. H. Edmondson, Honolulu, T. H., Attorney for Minor Respondents. [92]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY,

ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including December 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of December, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [93] other papers as part of said record.

Dated at Honolulu, T. H., November 17, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court.

Consented to:

_____,

Attorney for Complainants-Appellees.

_____,

Attorney for Respondents-Appellees. [94]

I certify that I served true copies of the within order on W. L. Stanley, attorney for complainants-appellees, and on D. O. Smith & L. J. Warren, attorneys for respondents-appellees by leaving said copies with a clerk in their offices this 17th Nov., 1922.

H. EDMONDSON,

Attorney for Appellants.

Service of a copy of the within order admitted this 17th day of November, 1922.

_____,

Attorney for Complainants-Appellees.

_____,

Attorney for Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time for Preparation of Record. Filed November 17, 1922 at 11:55 A. M. J. A. Thompson, Clerk. [95]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including February 15, 1923, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this

Court be and they are hereby allowed until and including the 15th day of February, 1923, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, [96] California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all other papers as part of said record.

Dated at Honolulu, T. H., December 18, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court. [97]

I certify that I have served true copies of the within order upon Mr. W. L. Stanley, attorney for complainants-appellees, and on Messrs. W. O. Smith and L. J. Warren, attorneys for respondents-appellees, by leaving same at their office this 18th day of December, 1922.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time. Filed December 18, 1922, at 1:45 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [98]

In the Supreme Court of the Territory of Hawaii.

No. 1348

H. FOCKE and H. M. von HOLT, Trustees under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Praecipe for Transcript of Record.

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare and certify a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore allowed, and include in said transcript the following pleadings,

proceedings, opinions, judgments, exhibits, affidavits and papers on file in said cause, to wit:

A. In record No. 1273:

(1) Complainants' petition and verification thereof by H. Focke, and attached thereto: Copy of will of James Gay dated May 25, 1893; [99]

(2) Order dated August 7, 1919, appointing guardian *ad litem* for minor respondents;

(3) Answer of respondents other than the minor respondents dated November 26, 1919;

(4) Amended answer of minor respondents dated January 23, 1920;

(5) Decree of Honorable Jas. J. Banks dated and entered in Circuit Court on April 6, 1920;

(6) Opinion of the Supreme Court of the Territory of Hawaii filed April 5, 1921;

(7) Notice of decision on appeal dated May 27, 1921, by the Supreme Court to the Honorable Jas. J. Banks, Judge of the First Circuit Court of the Territory of Hawaii;

B. In record No. 1348:

(8) Decree of Honorable Jas. J. Banks entered and filed in the Circuit Court on August 1, 1921;

(9) Opinion of the Supreme Court filed February 28, 1922;

(10) Decree filed in the Supreme Court March 8, 1922;

(11) Petition of minor respondents by their guardian *ad litem* for appeal, with affidavit of H. Edmondson attached;

(12) Order allowing appeal;

(13) Appeal bond;

(13b) Stipulation that appeal be taken under Rule 75 (Supreme Court Equity Rules), filed November 15, 1922; [Interlined with permission of Chief Justice Peters with consent of L. J. Warren this 16th Feb., 1923.—H. E.]

(14) Statement of evidence as and when approved by the Supreme Court or a Justice thereof;

(15) Certificate of Justice re statement of evidence as and when filed.

You will also please annex to and transmit with the record the original assignment of errors on appeal and the original Citation dated July 1, 1922, with admission of service of copies thereof by W. L. Stanley, attorney for complainants-appellees, and W. O. Smith and L. J. Warren, Attorneys for respondents-appellees, also originals of the following orders:

Order filed July 15, 1922, extending time for preparation and transmission of record to September 30, 1922;

Order filed September 18, 1922, extending time for preparation and transmission of record to November 30, 1922; [100]

Order filed November 17, 1922, extending time for preparation and transmission of record to December 30, 1922;

Order filed December 18, 1922, extending time for preparation and transmission of record to February 15, 1923.

Also your certificates under seal stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, Hawaii, December 18, 1922.

Respectfully,

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents-Appellants.

Service of a copy of the foregoing praecipe is admitted this 18th day of December, 1922.

W. O. SMITH,

L. J. WARREN,

Attorneys for Life Tenants-Appellees.

W. L. STANLEY,

By WM. T. RAWLINS,

Attys. for Complainants. [101]

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Praecipe for Transcript of Record. Filed December 18, 1922, at 1:45 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [102]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY et al.,

Respondents.

Additional Praecipe of Appellees.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

In conjunction with and as a part of the transcript of the record upon the appeal of the minor respondents and their guardian *ad litem* in the above-entitled cause, respecting which appellants have filed their praecipe with you on December 18, 1922:

You will please also prepare and certify the following additional portions of the record, including them in their chronological order in said record, namely:

(4a) The decision of the Honorable James J. Banks, Circuit Judge, dated and filed (in record No. 1273) April 2, 1920;

(6a) The opinion of the Supreme Court of the Territory of Hawaii, on rehearing, dated and filed (in record No. 1273) May 7, 1921;

(7a) The decision of the Honorable James J. Banks, Circuit Judge, dated and filed (in record No. 1348) August 1, 1921;

(13a) This praecipe.

Dated: Honolulu, T. H., December 26, 1922.

Respectfully,

WILLIAM O. SMITH,

LOUIS J. WARREN,

Attorneys for Life Tenant Respondents-Appellees.

[103]

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Appellees' Praecipe. Filed December 26, 1922, at 3:35 P. M. J. A. Thompson, Clerk.

Service of a copy of the foregoing Praecipe is admitted this 26th day of December, 1922.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents-Appellants.

W. L. STANLEY,

By W. T. R.

WILLIAM T. RAWLINS,

Attorneys for Complainants-Appellees. [104]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including April 5, 1923, for Preparation and Transmission of Record.

Upon the application of counsel for the Minor Respondents-Appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the Minor Respondents-Appellants herein and the Clerk of this Court be and they are hereby allowed until and

including the 5th day of April, 1923, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, [105] the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all other papers as part of said record.

Dated at Honolulu, T. H., February 2, 1923.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court.

Approved February 2, 1923.

_____,

Attorneys for Life Tenants Respondents-Appellees.

[106]

I hereby certify that I served true copies of the within order upon Messrs. W. O. Smith and L. J. Warren, attorneys for the life tenants, appellees, and upon Mr. W. L. Stanley, Attorney for complainants, by leaving copies in their offices this 2d day of February, 1923.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including April 5, 1923, for Preparation and Transmission of

Record. Filed February 2, 1923, at 2:50 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [107]

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Statement of Evidence.

James Gay made a will which was admitted in evidence, a true copy of which is attached to the petition forming part of the record. (To avoid duplication of printing, a copy of the will referred to is incorporated herein by reference as fully as if it were recopied here.)

Testimony of Herman Focke, for Complainants.

HERMAN FOCKE, one of the trustees under the testator's will, was called by the complainants as a witness, and testified:

I have resided in Honolulu nearly forty years and knew James Gay in his lifetime, and for a good many years before his death on May 28, 1893. He was living on his ranch at Mokuleia [108] where for about nine years before and until his death he was personally conducting a ranching business, consisting of horses and cattle. When I was appointed one of the executors of his estate his property consisted of:

(a) A leasehold (hereinafter called the "Mokuleia lease") made to him by J. P. Mendonca, dated May 27, 1884, of about 2500 acres of land at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1,250.00 and taxes;

(b) A leasehold made to him by the Commissioner of Crown Lands of the Government of Hawaii, dated March 1, 1876, of land at Humula, Ookala, Island of Hawaii, for a term of 25 years expiring March 1, 1901, under which he had made a sublease to the Ookala Sugar Company to expire with the head lease in 1901, under which he was receiving and to receive, as rent, 5% of the sugar produced from the land. Before his death he obtained a seven years' extension from the Government until March 1, 1908, at a nominal rent or rent free,

(Testimony of Herman Focke.)

but the sublease or sugar agreement with the Ookala Sugar Company was not extended in his lifetime. In July, 1900, the trustees of his estate extended it to the end of the additional term—1908;

(c) Cattle, horses, mules, farming implements and household furniture, valued in this estate inventory at his death at about $2,310.00; and

(d) Cash in my hands, as his agent, amounting to $816.59.

Gay formerly conducted a sheep ranch at Humuula. Then he sold that out, and retained for himself that part of [109] the Ookala leased land which he had contracted or subleased to the Ookala Sugar Company and which was suitable for cane land, about 1200 acres.

The values in the inventory as to the leaseholds were, for the Mokuleia lease $7,500.00, and for the Ookala lease $5,000.00. These were placed on them by me according to my best judgment after conferring with the estate's attorney, Cecil Brown, and Tom Gay, decedent's brother, a practical cattleman. The value so stated for the Ookala lease was as it then stood, in view of the fact that the agreement with the Ookala Sugar Company was producing about $650.00 a year; that was the correct value of the Ookala lease agreement with the Ookala Sugar Company. Mr. Gay left no real estate. The indebtedness of his estate was about $5,000.00, consisting of outstanding notes and the funeral expenses.

(Testimony of Herman Focke.)

At the time of Mr. Gay's death his family consisted of a wife and seven children (three sons and four daughters), all living with him on the ranch premises and all of whom, except one daughter, are still living and are named as respondents in this case. All of the minor respondents are grandchildren of the testator. At the time of his death his youngest child was three or four years old and his eldest about sixteen years.

The testator conducted the ranch, on the greater part of the Mokuleia premises, and subleased the remainder to others, and at the time of his death he was receiving from subleases of portions of Mokuleia a total gross annual rental of $2,723.50, out of which he was paying the head rent of $1,250.00. By the terms of this head lease he was obligated to cut lantana (a noxious shrub then prevalent) at heavy expense or there was danger of losing the head lease. [110]

The family continued to reside at Mokuleia until Mr. Gay died, in April, 1895, when the children went to Honolulu. After Gay's death the trustees continued to carry on the testator's ranching business along the same general lines as he had done in his lifetime, until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold by the trustees, realizing $4,065.00 net. This sum has since been invested and held by the trustees as *corpus* of the estate. In the meantime, on December 9,

(Testimony of Herman Focke.)

1898, a portion of the Mokuleia lease containing an area of about 800 acres was subleased by the trustee to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar (or the proceeds thereof) grown thereon. This sublease was assigned to the Waialua Agricultural Company and on July 2, 1902, the trustee subleased to that Company for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like sugar basis rental. In 1906 when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet.

On assuming charge of the estate, I found no books of the testator showing an account of the returns to him from the ranch, or his expenses in connection with the ranch.

From my accounts I find that for the first seven years of the trust the average returns per annum on the Mokuleia property were $999.13, after including the income from all sources at Mokuleia and the income from the subleases and rights of way and from the sales and disposition of cattle, stock and [111] ranch profits, and deducting therefrom expenses of $84,424.00. In 1893, the year of the testator's death, the amount received by the executors as returns from the Ookala Sugar Company was $642.79, and the net return from the same source for the year preceding the testator's death

(Testimony of Herman Focke.)

was $643.90. During the first seven years of the trust the average amount received by the trustees from the Ookala property was $1,383.54.

The first returns of income under the sublease made to Waialua Agricultural Company came in 1900 and 1901, up to which time the average income from Mokuleia was $999.13 as stated, and $1300.00 was the average income from the Ookala property.

Some of the subleased lands (not those subleased to Waialua Agricultural Company) were abandoned in 1905 and we could not get any other tenants. There were rice lands, of which the soil was unsuitable, poho (meaning lost, or lost in value), porous, used too much water, and the tenants could not make it pay, and when P. M. Pond made us an offer to sublease we accepted it, and under this sublease to him the estate secured a greater income than if it had continued to be conducted as a ranching business through the trustees. (The Court denied a motion by the guardian *ad litem* to strike the matters stated (in substance) in this paragraph as being irrelevant, incompetent and immaterial.)

Since the inception of the trust and until the filing of the bill in this case the trustees have paid out all of the income of the estate, first to the widow, Mrs. Gay, and afterwards to the children of Mr. Gay, until I was recently advised by the trustees' counsel, W. L. Stanley, in an opinion rendered in July, 1919, that there was some question as to

(Testimony of Herman Focke.)
whether the trustees' course in so dealing with the income was correct or not. [112]

(On cross-examination this witness gave figures, without details, as to realizations from the Ookala lease, from 1893 to 1906, which are not included here because they were incomplete on this first hearing and were on the second hearing brought out in detail, gross and net, as appears in the statement appearing below as a copy of Respondents' Minors Exhibit "A.")

The total income of the Mokuleia property from the inception of the trust down to 1907, was $90,-690.63, including the ranch business and everything with it. The net for those years was $6,266.37. All that the life tenants got from 1893 to 1907 was practically $6,000.00, not including the Ookala lease. The trustees have increased the values of these leaseholds enormously, by subleasing them, over the way they would have been able to do if operating it as a ranch.

In view of the abnormal high price of sugar during the last five years (the witness was testifying in January, 1920), the returns have been greater during those years than at any time before.

I can't say offhand how it was that the Mokuleia expenses were so large as $84,424.00, but one large item was the cleaning of the lantanas which cost us tholsands of dollars at that time, when the whole pasture lands all over the Island were covered with thick lantanas and it was destroying all the

(Testimony of Herman Focke.)

pastures, the pastures could not, we could not sell them. I would try to keep the lantanas out and there was a question whether we were obliged to do it or not under the terms of the lease, but as trustees we would not run the risk that Mr. Mendonca might jack us up and bring this suit against us for not having kept the lands clean of lantanas. That was a very great expense, and every yearly account to the courts mentions a sum we had to spend. [113]

The following figures respecting rents from the Mokuleia lease are incorporated in this statement of evidence, by order of the Judge signing same, over the objection of counsel for the life tenant appellees that the same are not material to the issues on this appeal, namely:

Year.	Fixed Annual Rents.	Rents being portion of sugars produced.
1894	$2573.50	None
1895	2573.50	None
1896	2573.50	None
1897	2573.50	None
1898	3153.50)	
1899	3153.50)	
1900	3153.50)	
1901	3153.50)	
1902	3153.50)	$44,856.62
1903	3153.50)	or an average of $4,984.06
1904	3153.50)	per annum
1905	2077.50)	
1906	2077.50)	
1907	2077.50	9,418.79

Year.	Fixed Annual Rents.	Rents being portion of sugar produced.
1908	2890.00	5,391.42
1909	2890.00	11,574.67
1910	2965.00	6,889.14
1911	3290.00	14,290.74
1912	3290.00	4,774.19
1913	3852.50	12,174.31
1914	4040.00	5,664.70
1915	4040.00	15,966.49
1916	4040.00	12,974.38
1917	4040.00	17,456.30
1918	4040.00	15,765.30
1919	4040.00	21,817.76

Total fixed rent—
82,018.50

Total sugar rentals.....199,015.26
82,018.50

Grand Total 281,033.76

The above total of $281,033.76 is approximate and is subject to correction. From it must be deducted the rent paid under the head lease of $1,250.00 for 26 years, namely, $32,500.00, leaving approximately $248,533.76 from which would also have to be deducted sundry other charges for administering the trust and incidental purposes, none of which appear in evidence. [114]

Testimony of T. H. Petrie, for Complainants.

Mr. T. H. PETRIE, called as a witness by the guardian *ad litem,* and (over the objection of counsel for the life tenants, that the present value of the Mokuleia lease is immaterial and cannot affect the question of whether or not the trustees should have converted this lease into cash on the testator's death), testified as follows:

I am a director of Castle & Cooke, Ltd., agents for Waialua Agricultural Company which now has some 865 acres under lease from the trustees of the James Gay estate at Mokuleia. I am acquainted with the past record of that lease so far as the Waialua Sugar Company is concerned. I have the figures from 1905 to 1919, as the results obtained from the cultivation of those lands. I have gone into the value of this leasehold as of the present time only in a general way. I have considered the two Waialua subleases and the other subleases—all producing a fixed rent of $4,040.00 and one-twentieth of the sugar.

"Q. What value had you put on those leaseholds as of the present time (January 27, 1920)?

A. In answering that question I want it understood, if the Court please, that I am not answering from the standpoint of an expert on leasehold values. I am answering that question from the standpoint of what I would be willing to pay for this leasehold if it was offered for sale this morning. I value it at $90,000.00—I would offer $90,-

(Testimony of T. H. Petrie.)

000.00 for it, . . . speaking for the Waialua Agricultural Company of course."

On cross-examination by counsel for the life tenants Mr. Petrie testified further: [115]

This figure of $90,000.00 covers all of these subleases, in some of which the Waialua Agricultural Company is not at present interested. I haven't given any consideration to the value of the original Mendonca lease, I haven't seen that lease except to know what the rental is. The figure is confined entirely to the amount I would offer for the series of subleases that were mentioned, as of the present time. I haven't considered it from any standpoint of the previous years. This figure of $90,000.00 would be to buy the whole thing,—with all of the subleases.

"Q. That then would be practically the elimination then of any profit to the Gay estate as the holder of the principal lease?

A. Exactly, the lease would be from Mendonca to us, practically.

Q. In that way eliminate or cut out any obligation of the Waialua Agricultural Company to pay rent on the present basis under its subleases?

A. Exactly, yes.

Q. What consideration have you had in mind in naming that figure of ninety thousand dollars as the amount you would offer?

A. The results from the time that we have used and cultivated the lands that we have occupied on

(Testimony of T. H. Petrie.)

which rentals that have been paid on the other basis, and our judgment as to what we might expect for the future in so far as the cultivation and sale of sugar is concerned, practically all of that land outside of the lease to the Chinamen is cultivated in sugar cane.

Q. That then involves to some extent a matter of judgment as to what the future will develop for sugar? A. Exactly.

Q. What the returns of sugar will be hereafter?

A. Yes. [116]

Q. Will you please tell us what you consider would be the value of this (Mokuleia) lease from the standpoint of the Gay estate,—the trustees of the Gay estate?

A. No, I am not prepared to answer that.

Q. You are not then assuming to set any figures except what the Waialua Agricultural Company would offer? A. Exactly."

On cross-examination by counsel for the trustees, Mr. Petrie further testified:

In 1893, when Mr. Gay died, the sugar industry in the Islands and on this Island was very largely undeveloped; in 1893 the Ewa Sugar Company was struggling for its existence, and it was a question whether Ewa would go under or not,—in 1892 or 1893. At that time the Oahu Sugar Company had not been started; the Oahu Railway, which to a great extent made possible three large plantations on the Ewa side of this Island was, I think, strug-

(Testimony of T. H. Petrie.)

gling for an existence. At the time of Mr. Gay's death it did not extend as far as Ewa (from Honolulu). The present Waialua Agricultural Company had not been started, but was evolved some five or seven years later out of a one-horse concern run by the Halstead Brothers. Waialua Agricultural Company was organized in 1898, developed and to take in all the undeveloped lands in that district including the Mokuleia section. That is when it was taken over and leased by the Waialua Agricultural Company. I think that was the result, in a very large measure, of the treaty of annexation of the Islands in 1898. It was at that same period that Waialua and other large sugar enterprises were started throughout these Islands. [117]

(A motion to strike the opinion of Mr. Petrie as to the value of the Mokuleia lease was denied.)

Testimony of Chas. T. Wilder, for Complainants.

Mr. CHAS. T. WILDER, tax assessor since 1908 for the District where the Mokuleia leasehold property is situate, called as a witness by the guardian *ad litem,* over the objection of counsel for the life tenants that the point of present value was immaterial, testified:

"If the average net income would be the same for the next fourteen years, and it is on the past 13 years according to these figures you have given me, if money is worth no more 14 years later than it is now on a basis of these numbers, that (the present value of the Mokuleia lease) would be $87,-

(Testimony of Chas. T. Wilder.)

359.37. In other words, the lease in 14 years would take in $197,511.12, which, discounted at the present time for 14 years, would amount to this, $87,359.37, or, in other words, $87,359.37, invested to-day at 6% interest would purchase $197,511.58 in 14 years."

On cross-examination by counsel for the life tenants Mr. Wilder testified further:

"Q. Would you wish to be understood as saying in your opinion that is the fair market value of this lease?

A. Personally I wouldn't take any chance fourteen years from now on that value. The last four or five years' rentals have been very large. There is no guaranty that in ten years they will be that large.

Q. In other words you have just made hypothetical calculations as to the present value of this assured income?

A. I will qualify my statements. If the present price of sugar remains the same, averages the same, and the price of money the same, that would be what it would do. [118]

Q. Your personal opinion of the value of the property doesn't enter into it? A. No."

The following additional evidence was taken at the second hearing before the Circuit Judge, following the rendition of the opinion of the Supreme Court of the Territory filed April 5, 1921.

Testimony of Herman Focke, for Complainants (Recalled).

Mr. HERMAN FOCKE was recalled as a witness and, on direct examination by the guardian *ad litem,* testified as follows:

I recall that $5,000.00 was the value placed on the Ookala leasehold in the estate inventory. That was the value submitted to the Court at the time. It agreed with my best judgment at the time. We had to place a value on it, and it is hard for me to say now on what we based it. "I suppose that —I know that so much sugar was received a year and I suppose that we took the—eight times of the rental; that was, in those years, about the value of the property."

(The witness then identified a statement of the rentals received under the Ookala lease, gross and net,—which was received in evidence as Respondents' Minors Exhibit "A,"—from the inception of the trust until the lease finally expired, showing a total net sum of $34,329.24, of which statement the following is a full and true copy:)

Respondents' Minors Exhibit "A."

Date.			Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Net.
1893–4	June 9		642.79	40.		June 30, 1894	602.79
1894–5	Aug. 7	387.00					
	Oct. 1	464.63	851.63	40.		" 1895	811.63
1895	Aug. 7	257.06					
1896	June 30	1612.44	1869.50	40.		" 1896	1829.50
1896	Aug. 19		1377.44	35.		" 1897	1342.44
1897	July 31		412.31	35.		" 1898	377.31
1898	Oct. 28		1836.45	30.		" 1899	1806.45
1899	Nov. 21		2794.65	25.		" 1900	2769.65
1900	Nov. 3		4528.59	25.		" 1901	4503.59

Forward— [119]

Date.		Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Net.
					Forward—	
1901	Oct. 11	2956.77	25.		June 30, 1902	2931.77
1902	Sep. 29	828.18	25.		" 1903	803.18
1903	Dec. 31	1515.01	25.		" 1904	1490.01
1904	Nov. 5	1875.56	25.		" 1905	1850.56
1905	Nov. 21	948.13	25.		" 1906	923.13
1906	Nov. 8	4885.95	12.50	209.	" 1907	4664.45
1907	——	——	——	——	" 1908	——
1908	Nov. 24	7630.28	7.50		" 1909	7622.78
		$34,953.24	415.00	209.		$34,329.24

Total amount of rents received.....$34,953.24
Less taxes and freight 624.00

Net $34,329.24

(Counsel for the life tenants then made Mr. Focke their own witness, and the following is here quoted from the transcript:)

"Mr. WARREN.—I would like to make this explanatory statement in the record, also, that it will be recalled as pretty well intimated by the Supreme Court that, in dealing with the Ookala lease, your Honor didn't go into that as a separate issue particularly,—discussed the case from a very general standpoint and dealt principally with the Mokuleia lease.

The COURT.—Yes, that being the matter that was presented to me.

Mr. WARREN.—Yes, your Honor. So that the record which went before the Supreme Court contained practically nothing of the nature that I now wish to have your Honor receive into this record in order that we may present it, as a matter of record before the Supreme Court, in an appeal as I assume will be taken from whatever order your Honor makes here. The surrounding [120] facts and circumstances attendant upon the execution of this will by Mr. Gay. There is nothing in the record, and we did not anticipate the importance at the first hearing of indicating to your Honor that Mr. Gay, at the time he made this will and used the term 'rents, issues and profits' of his estate to go to his children for life, that he then knew he was dying. We want to prove facts that will

(Testimony of Herman Focke.)

tend—that will show and indicate that Mr. Gay, when he made that will, was dying, or believed he was dying, and, therefore, could not have used the word 'rent' in that will with respect to the possible after acquisition of real estate in fee, and that his use of the word 'rents' in that will had respect to the only property he owned at the time concerning which he was making his will, namely, these leaseholds. This might have a very strong bearing on the question whether or not the word 'rents' in that will should be held to apply to leaseholds, if the Ookala lease did not—would not be converted.

The COURT.—You may go ahead.

Mr. EDMONDSON.—May it please the Court, I would like to make an objection. The decision of the Supreme Court says: (Reads.) In view of that decision I take it that this evidence would be ruled out.

The COURT.—I will have your objection noted.

Mr. EDMONDSON.—Might we have an exception to your Honor's ruling, to every question?

The COURT.—All right, you may do that, to save the record."

Mr. FOCKE then further testified as follows: [121]

I had known Mr. James Gay rather intimately for a considerable number of years before his death and was in attendance upon him or visiting him frequently during his last illness. I was present

(Testimony of Herman Focke.)

at the time this will was executed and on the day before.

"Q. Will you state to the Court what you know, from your own observation of Mr. Gay on the day he made the will and the day before he made the will, as to his then condition and any statements he made respecting himself and his condition?

A. Mr. Gay was very low indeed at that time. He was in a dying state, and on the day previous to the making of the will his physician who was attending him and who was a friend of Cecil Brown and myself came to me and said that he had told Mr. Gay and spoke to him about his affairs and so on, and in consequence, Mr. Gay wanted him to bring Cecil Brown up to make a new will. This was done on the 24th of May. I—the old will was in my possession; I was told to take it along. I went and Mr. Gay then gave his instructions to bring Mr. Brown. The next morning the new will was presented by Cecil Brown and signed in my presence by him and in the presence of the witnesses, who were Tom Gay, a brother of Gay, and the brother-in-law of Mr. Gay, Mr. Richardson, and Cecil Brown."

Mr. Gay told me to destroy the old will and to keep the new will. I have said that he was dying because I personally observed his condition. He had a hemorrhage and also an accident on the ranch; he was kicked by a horse and brought to town. He could not move and he was swelling. He had Bright's disease; dropsy set in and worked its

(Testimony of Herman Focke.)

way upwards and he was swelling inwards, up about the body. He was very weak and had coughing spells and spoke in a low voice. I myself obverved [122] the progress of his disease for several days prior to his death. On May 24th Dr. Trousseau came in and told me that he could not save him, that he was in a very low condition and spoke of the dropsy and of his Bright's disease.

"The COURT.—Q. Well, he was a very sick man and in a dying condition?

A. Yes, absolutely."

"Mr. WARREN.—I would like the record to show that the reason of this offer is because the Supreme Court specifically said 'under those circumstances,' indicating that they made that decision upon a record which didn't disclose this fact.

The COURT.—All right."

Testimony of H. D. Young, for Respondents.

Mr. H. D. YOUNG, called as a witness by the life tenants, testified as follows:

I am manager of the Audit Company of Hawaii, Limited.

(Here Mr. Edmondson conceded the qualifications of Mr. Young as an accountant and actuary. He was handed Respondents' Minors Exhibit "A," being a statement of gross and net rentals received under the Ookala lease above set forth, and then testified as follows:)

Given the case of James Gay dying in May of 1893, when he held the lease called the Ookala lease,

(Testimony of H. D. Young.)

under which, after his death, rents were received, gross and net, as shown by this statement.

Q. "Now, I want to ask you, Mr. Young, in your opinion as an accountant and actuary, given in this case: James Gay dying in May of 1893 held a lease called the Ookala lease, under which, after his death, rents were received in gross amounting as shown by this statement, a net amount as shown by this statement. Assuming that, as an actuary, you are asked to state the method [123] and means by which you would calculate the amounts that should be put by by the trustees to equal $34,329.24, at the expiration of the lease in 1908, what would be the correct method of determining the amounts that should be put by by the trustees each year out of these rents to arrive at that result, so that at the expiration of the lease the total full amount of rent actually received would be on hand?

Mr. EDMONDSON.—I object to the question, if the Court please, on the ground that the method of determining the value of this Ookala property is for your Honor to decide and not for a witness to decide.

(Argument.)

The COURT.—Objection is overruled."

I would say that the method and means to calculate the amount that should be put by by the trustees to equal $34,329.24 at the expiration of the lease in 1908 would be that of calculating the present value of each sum as it was received in each year as of the date of death. The sum total of

(Testimony of H. D. Young.)

those values would represent the total present value of all amounts so received as each installment was received and the present value would be withheld or deducted and reinvested at the usual rate of six per cent and each installment as invested accumulates interest which, as received from time to time, would be reinvested; and at the determination of the period the full sum required would be on hand. I have taken these figures shown by this statement as the net rentals for each year and made the following computations: [124]

(Here is given a full copy of the statement of calculations produced by the witness, the same being marked Life Tenants' Exhibit 1.)

Life Tenants' Exhibit No. 1.

Date.			Rents.	Taxes.	Freight.	As appears in Estate's accounts of.		Present worth on May 28, 1893.
1893–4	June 9		642.79	40.		June 30,	1894	602.79
1894–5	Aug. 7	387.00						
	Oct. 1	464.63	851.63	40.		"	1895	765.69
1895	Aug. 7	257.06						
1896	June 30	1612.44	1869.50	40.		"	1896	1628.25
1896	Aug. 19		1377.44	35.		"	1897	1127.13
1897	July 31		412.31	35.		"	1898	298.86
1898	Oct. 28		1836.45	30.		"	1899	1349.88
1899	Nov. 21		2794.65	25.		"	1900	1952.50
1900	Nov. 3		4528.59	25.		"	1901	2995.17
1901	Oct. 11		2956.77	25.		"	1902	1839.43
1902	Sep. 29		828.18	25.		"	1903	475.40
1903	Dec. 31		1515.01	25.		"	1904	832.00

Date.		Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Present worth on May 28, 1893.
1904	Nov. 5	1875.56	25.		June 30, 1905	974.85
1905	Nov. 21	948.13	25.		" 1906	458.77
1906	Nov. 8	4885.95	12.50	$209.	" 1907	2186.88
1907	——	——	——	——	" 1908	——
1908	Nov. 24	7630.28	7.50		" 1909	3180.75
		$34,953.24	415.00	$209.00		$20,668.35

Total amount of rents received.....$34,953.24
Less taxes and freight 624.00

$34,329.24

Present value of net rentals at date of death of Testator, May 28, 1893.....$20,668.35

Testimony of Herman Focke, for Respondents (Recalled—Cross-examination).

Mr. FOCKE was recalled as a witness and on cross-examination by counsel for the life tenants testified:

In reference to the value of $5,000 which was placed in the estate inventory for the Ookala lease, it was at that time customary to take eight years rental of a lease as about the value of the capital of the property. At that time we only had knowledge that the contract with the Ookala Plantation was to run for seven years only. The lease was extended by the Government before Mr. Gay died, but the contract with the Ookala Plantation [125] was not extended. In 1893 when we were not assuming to consider the Ookala contract as lasting more than seven years, the rent for that year was $642.79, represented in the value of the sugar for 1893. If on my knowledge of the conditions at that time the Ookala lease had been put up for sale, I don't think it would have fetched—I don't know now because all we know is that we received so much more sugar in later years. If I had been able at that time to know and have it before me the figures of rent that have come in I would certainly never have conceived of valuing that lease at $5,000.00.

(On July 29 Mr. Edmondson, referring to Mr. Gay's testimony giving the day before as above shown, asked and obtained leave of the Court to state the reasons for his objection and exception

thereto taken the day before as follows: "On the ground that the evidence is incompetent, irrelevant and immaterial and beyond the scope of this hearing.")

Approved this 16th day of February, 1923.

[Seal] ANTONIO PERRY,

Associate Justice Supreme Court of the Territory of Hawaii. [126]

Certificate of Justice Under Equity Rule 75 Re Statement of Evidence and Record Relating Thereto.

This is to certify that on the 16th day of December, 1922, the minor respondents by their guardian *ad litem,* appellants, lodged in the office of the Clerk of the Supreme Court of the Territory of Hawaii their proposed statement of the evidence to be included in the record on appeal in the above-entitled cause under paragraph (b) of Equity Rule 75, and on the same day gave due notice to the attorneys for the other parties of the lodgment of such statement of evidence, naming the time and place when and where they would ask the undersigned to approve such statement of evidence, such time and place so named being at least ten days after such notice.

Within the time limited therefor the life tenants respondents-appellees lodged their objections and proposed amendments to said proposed statement of the evidence, and the same were heard and disposed of by the undersigned who directed the state-

ment of the evidence and record relating thereto to be redrafted with such alterations and amendments thereto as were allowed, and the same having been so redrafted and presented to the undersigned, in the full and complete form above appearing, the same is hereby approved by the undersigned to be filed in the office of the Clerk of the said Supreme Court as the statement of the evidence to be included in the record on appeal in the above-entitled cause, including the matters incorporated therein relating to offers of evidence, objections to evidence, and rulings thereon, as a part of said record on appeal allowable [127] in conformity with paragraph (c) of Equity Rule 75.

Dated Honolulu, T. H., February 16, 1923.

[Seal] ANTONIO PERRY,

Associate Justice, Supreme Court, Territory of Hawaii.

Approved (without waiving the objections noted in said record as made by the undersigned):

W. O. SMITH and
L. J. WARREN,

Attorneys for Life Tenants Respondents-Appellees.

W. L. STANLEY,

Attorney for Complainants-Appellees. [128]

Service of the within statement of evidence is hereby admitted this —— day of February, 1923.

_____,

Attorneys for Life Tenants Respondents-Appellees.

_____,

Attorney for Complainants-Appellees.

[Endorsed]: No. 1348. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. H. Focke et al, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Statement of Evidence and Certificate Relating Thereto. Filed February 16, 1923, at 11:55 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [129]

In the Supreme Court of the Territory of Hawaii.

October Term, 1922.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Certificate of the Clerk of the Supreme Court of the Territory of Hawaii to the Transcript of Record on Appeal.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for appeal, filed June 30, 1922, in the above-entitled cause, the original whereof is attached to the foregoing transcript, being pages 70 to 71, both inclusive, and in pursuance to the praecipe filed December 18, 1922, on behalf of the minor respondents, and of the praecipe filed December 26, 1922, on behalf of the respondents-appellees, to me directed, copies whereof are attached to the foregoing transcript, being pages 99 to 102, both inclusive, and pages 103 to 104, both inclusive, thereof, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 55, both inclusive, AND I CERTIFY [130] the same to be full, true and correct copies of the pleadings, record, entries and opinions which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the cause entitled "H. Focke and H. M. von Holt, trustees under the Will and of the Estate of James Gay, deceased, complainants, versus Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, Frida

Gay; Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, Respondents,'' and Numbered 1273.

I FURTHER CERTIFY that pages 56 to 69, both inclusive, pages 80 to 82, both inclusive, and page 92, of the foregoing transcript of record are full, true and correct copies of the pleadings, record, entries, opinions and final decree which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause as above entitled and Numbered 1348.

I DO FURTHER CERTIFY that the Original Assignment of Errors, being pages 72 to 77, both inclusive, the Original Order Allowing Appeal, being pages 78 to 79, both inclusive, the Original Citation on Appeal, with admissions of service of copies thereof by W. L. Stanley, Esq., Attorney for complainants-appellees, and by W. O. Smith, Esq., and L. J. Warren, Esq., attorneys for respondents-appellees, being pages 83 to 85, both inclusive, the Original Order filed July 17, 1922, extending time for preparation and transmission of record to September 30, 1922, being pages 86 to 88, both inclusive; the Original Order filed September 18, 1922, extending time for preparation and transmission of record to November 30, 1922, being pages 89 to 91, both inclusive; the original order filed November 17, [131] 1922, extending time for preparation and transmission of record to December 30,

1922, being pages 93 to 95, both inclusive, the original order filed December 18, 1922, extending time for preparation and transmission of record to February 15, 1923, being pages 96 to 98, both inclusive; the original order filed February 2, 1923, extending time for preparation and transmission of record to April 5, 1923, being pages 105 to 107, both inclusive, and the original statement of evidence, filed February 16, 1923, with the certificate of Hon. Antonio Perry, Associate Justice of the Supreme Court of the Territory of Hawaii to said statement of evidence, being pages 108 to 129, both inclusive, of the foregoing transcript of record, are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is $80.25, and the said amount has been paid by H. Edmondson, Esq., attorney and guardian *ad litem* for the minor respondents, appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 24th day of February, A. D. 1923.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [132]

[Endorsed]: No. 3989. United States Circuit Court of Appeals for the Ninth Circuit. Eva Gay, a Minor, Beatrice Gay, a Minor, Sonny James

Mokuleia Gay, a Minor, Michael Vanatta K. Gay, a Minor, Llewellyn Napela Gay, a Minor, Albert Gay Harris, a Minor, Walter William Holt, a Minor, Alice K. Holt, a Minor, and Ethel Frida Holt, a Minor, by Harry Edmondson, Their Guardian *Ad Litem,* Appellants, vs. H. Focke and H. M. von Holt, Trustees Under the Will of the Estate of James Gay, Deceased, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay and Frida Gay, Appellees. Transcript of Record. Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filed March 5, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.